

**PROHIBITING PRODUCT PLACEMENT AND THE USE OF CHARACTERS IN
MARKETING TO CHILDREN**

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INTRODUCTION

This article argues that certain marketing practices – specifically product placements and the use of popular characters to promote products – are deceptive when used to market to children. Therefore, it argues that such practices should be prohibited by federal law and further, that such a law could be passed consistent with the First Amendment.

Parts I and II describe the practice of product placements and spokes-character marketing and the limited extent to which these practices have been regulated. Because these forms of marketing increasingly are being used to market junk foods to children and because the federal regulatory agencies have done little to stop these practices, Part III concludes that legislation restricting product placements and character marketing to children is needed. To determine whether such legislation would be constitutional, Part IV summarizes and applies the leading Supreme Court commercial speech cases. After reviewing research on whether product placements and character marketing are deceptive, it concludes that the Supreme Court likely would find the proposed legislation constitutional under the first prong of the *Central Hudson* test, which permits the prohibition of commercial speech that is misleading or deceptive. Further, legislation prohibiting product placements and character marketing to children would be consistent with the concerns underlying the commercial speech doctrine because its effects would be limited primarily to children and it would limit only certain forms of advertising that lack significant informational value. Part V addresses how such legislation would contribute to the reduction of childhood obesity, and Part VI examines whether such legislation would be workable.

I. PRODUCT PLACEMENTS

“Product placement is a form of promotion in which advertisers insert branded products into programming in exchange for fees or other consideration.”² Product placements take three basic forms: 1) visual, i.e. where a product, logo or sign is shown; 2) auditory, i.e., where the product is mentioned, or 3) where the product is used or plays a role in the program.³ Although product placements have been used for decades, they have become much more prevalent in the past few years.⁴

A. The Practice of Product Placement

Product placement has become big business. The amount of money spent on product placements increased from \$190 million in 1974 to \$3.458 billion in 2004.⁵ From 1999 to 2004,

² Letter from Mary K. Engle, Assoc. Director for Advertising Practices, FTC to Gary Ruskin, Exec. Dir., Commercial Alert at 1 (Feb. 10, 2005) (FTC Staff Letter).

³ Matthew Savare, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 UCLA Ent. L. Rev. 331, 356 (2004). The placement of AOL in the movie “You’ve Got Mail” is an example of the third category. John A. McCarty, *Product Placement: The Nature of the Practice and Potential Avenues of Inquiry*, in *The Psychology of Entertainment Media: Blurring the Lines between Entertainment and Persuasion* 47 (L.J. Shrum, ed. 2004). Reality television shows, in particular, have been able to incorporate products into the storyline. For example, “entire episodes [of “The Apprentice”] have been built around Procter & Gamble’s Co.’s Crest Refreshing Vanilla Mint toothpaste, Levi Strauss & Co. denim jeans and Pepsi-Cola North America’s Pepsi Edge.” Meg James, *Products are Stars in New Ad Strategy*, L.A. Times, Dec. 2, 2004. A recent example is the starring role to be played by Levi jeans in the Warner Bros. film based on the book, *The Sisterhood of the Traveling Pants*. Matthew Creamer, ‘*Sisterhood of the Traveling Pants*’ a Good Fit for Levi’s, Madison & Vine, June 15, 2005.

⁴ The practice of product placement in the movies began in the 1940s. McCarty at 46. However, it was the phenomenal success of the 1982 placement of Reese’s Pieces in E.T. that is credited for increasing advertisers’ interest in product placements. See, e.g., Savare at 333. The increased use of product placements on television was fuelled by the success of placements for Junior Mints in “Seinfeld.” Sharmistha Law and Kathryn A. Braun-LaTour, *Product Placements: How to Measure their Impact*, in *The Psychology of Entertainment Media: Blurring the Lines between Entertainment and Persuasion* 63 (L.J. Shrum, ed. 2004).

⁵ PQ Media, LLC, *Product Placement Spending in Media 2005: Executive Summary* 6 (Mar. 2005).

the overall product placement market grew at a compound annual rate of 16.3%.⁶ Product placement spending in 2005 is expected to increase 22.7%, to a total of \$4.24 billion.⁷

Today, “there is a conscious and coordinated effort on the part of content creators, production companies, studios, marketers, and manufacturers to integrate products into entertainment programming in a systematic, efficient and persuasive manner.”⁸ Over one hundred specialized advertising agencies are devoted to product placement.⁹ Several different services have been developed to measure product placement impact.¹⁰ Most movie and TV studios have product placement departments.¹¹ One study found that as many as 15 branded products appear in every half hour of network programming and that 40% these are product placements.¹²

Analysts have posited many reasons for the increase in product placements. Law and Braun-LaTour summarize the advantages of product placements:

Practically, placements appear to be a good deal for manufacturers. They often cost less than traditional advertising, appear in a low clutter environment, appeal to a worldwide audience, get recycled with the program, imply a celebrity endorser, and are in an optimal environment where consumers are captive to the product’s placement (no remotes!).¹³

⁶ *Id.*

⁷ *Id.* at 8.

⁸ Savare at 334.

⁹ Juliet B. Schor, *Born to Buy: The Commercialized Child and the New Consumer Culture* 78 (2004).

¹⁰ Nielsen Product Placement Service catalogs and counts all visual and audio references to products during prime time entertainment programming on the six major TV networks and reports how many viewers were watching the program at the time of the product mention or appearance. Anna Heinemann, *TNS Launches Product-Placement Measuring Service*, AdAge, June 21, 2005. In June 2005, TNS Media Intelligence launched its Branded Entertainment Reporting Service. *Id.* IAG Research offers yet another service for measuring the impact of product placements called In-Program Performance. *Id.* CinemaScore is used to calculate placement fees for product placements in movies. Law & Braun-LaTour at 66.

¹¹ Law & Braun-LaTour at 64.

¹² *Id.* citing (Avery & Ferraro 2000).

¹³ Law & Braun-LaTour at 64.

Yang *et al.* also note that placing products in movies or television programs allows advertisers to target very specific audiences.¹⁴ Furthermore, product placements have a longer life than traditional commercials since movies remain popular for many years, are often shown on television and are available for sale or rental on tape or DVD.¹⁵ Likewise, television programs are often rerun and are increasingly available on DVD.

Bhatnagar *et al.* note the advantages of product placements over both unpaid publicity and traditional advertising: product placements are superior to free publicity because they give the sponsor control over the message, while, at the same time, they are superior to traditional advertising in that “[p]laced messages, which are paid for but do not identify the message sponsor, have the potential to overcome consumers’ skepticism toward ads.”¹⁶ Yang *et al.* note that audiences are less skeptical and more receptive because product placements are not perceived as advertisements.¹⁷ McCarty also notes that traditional advertising messages are interpreted in the context of the persuasion knowledge generated by awareness that advertising is persuasive communication and that normal skepticism is reduced when viewers see a product in the context of a story. He concludes that a “good product placement may be one that fits with the story in such a way as to make us forget that it is there to persuade us.”¹⁸

¹⁴ Moonhee Yang, Beverly Roskos-Ewoldsen, David R. Roskos-Ewoldsen, *Mental Models for Brand Placement* in *The Psychology of Entertainment Media: Blurring the Lines between Entertainment and Persuasion* 80-81 (L.J. Shrum, ed. 2004).

¹⁵ *Id.*

¹⁶ Namita Bhatnagar, Lerzan Aksoy, Selin A. Malkoc, *Embedding Brands within media content: The impact of message, media and consumer characteristics on placement efficacy* in *The Psychology of Entertainment Media: Blurring the Lines between Entertainment and Persuasion* 104 (L.J. Shrum, ed. 2004).

¹⁷ *E.g.* Yang *et al.* at 81.

¹⁸ McCarty at 49-50. *See also* Commercial Alert Complaint to FTC: “advertisers have found embedded ads to be effective, precisely because viewers are off guard.” (2) cites various trade press articles

Product placements are also seen as a response to new technologies that allow consumers to avoid watching traditional advertisements on television. An article in the *New York Times* describes the goal of product placements as “regain[ing] the attention of consumers who can avoid advertising by using digital video recorders, satellite radio and digital juke boxes.”¹⁹ Digital video recorders (DRVs) such as TiVo, and remote controls allow viewers to skip over traditional advertisements. A study by Media Planning Group “found that 90% of people with DVRs skip commercials in recorded programming—and just 16% watch the ads when viewing live TV, rather than doing something else or channel hopping.”²⁰

We can expect to see even more product placements in the future. CBS Chairman Les Moonves recently told investors to expect “a quantum leap in the number of products integrated into your television shows this year.”²¹ AdAge reports that a “growing number of marketers want to persuade the nation’s print magazines to open the text of their editorial pages to product placements.”²² And a PQ Media Special Report notes that “[t]o compensate for [advertisers’] perception of diminished advertising returns” from traditional television spot advertising, “marketers have substantially ratcheted up the role of product placement in their buying strategies...And this is a trend we expect to continue in the foreseeable future.”²³

Product placements are common in movies watched by children. For example, Walt Disney Pictures’ “Herbie: Fully Loaded” has been described as “a product-placement movie

¹⁹ Stuart Elliot, *More Products Get Roles in Shows, and Marketers Wonder if They’re Getting Their Money’s Worth*, *NY Times*, Mar. 29, 2005.

²⁰ Theresa Howard, *Product Placement in TV shows moves out of background*, *USA Today*, Oct. 14, 2004, at 3B.

²¹ John M. Higgins, *Moonves: Prepare for Plugs Aplenty*, *Broadcasting & Cable*, June 13, 2005, at 4.

²² Jon Fine, *Marketers Press for Product Placement in Magazine Text*, *AdAge*, April 12, 2004.

²³ PQ Media at 5.

gone wild.”²⁴ In “Spider-Man,” Spider-Man uses his web-spinning power to retrieve a Dr. Pepper.²⁵ Other recent examples of children’s movies with paid product placements include “Madagascar” (Coca-Cola, Denny’s), “Scooby-Doo 2” (Burger King, Gatorade), “Fantastic Four” (Burger King, Pepsi, Kool Aid, Mountain Dew, Oscar Meyer), and “Spider-Man 2” (Dr. Pepper, Fritos, Pop-Tarts).²⁶

Product placements are also common in television programs watched by children.²⁷ “American Idol,” in which the judges sip Coca-Cola, is one of the most commonly cited examples.²⁸ Another example would be the appearance of Canada Dry vending machines (which do not actually exist) on “Buffy the Vampire Slayer.”²⁹ NBC’s “American Dreams,” another top show among child viewers, featured Campbell’s tomato soup in nine episodes the 2004-05 season. The daughter on the 1960s era drama entered a Campbell’s-sponsored essay contest and the family ate a lot of tomato soup. Cans of Campbell’s tomato soup may be seen “in the

²⁴ Ross Johnson, *Product Placement for the Whole Family*, NY Times, July 6, 2005. This article describes one of many product placements: “The only time Ms. Lohan /Peyton touches food or drink is when she pulls a prominently displayed bottle of Tropicana orange juice from a kitchen refrigerator. In a scene 20 minutes later, Maggie enters the kitchen growling at another character, ‘If you touched that orange juice, I’ll kill you.’”

²⁵ *Pestering Parents*, at 21.

²⁶ These examples are from www.brandchannel.com/brandcameo_films.asp. This site notes that some children’s movies also feature brands as a joke. For example, the site describes *Shrek 2*: “While free of ‘real’ brands, this land of make believe does make fun. From Olde Knavery and Versarchery to Farbucks coffee, Baskin Robinhood and Burger Prince, many jokes require knowledge of non-fairytale brands. Brands are flooding children’s films despite apparent thematic barriers.” See also www.kokogiak.com (documenting product tie-ins with the movies “The Cat in the Hat,” “The Incredibles,” and “The Hulk.”)

²⁷ Teens are also targeted by product placements. See, e.g., Abbey Klaassen, *MTV Changes Strategy to Embrace Product Integration*, Madison & Vine, July 11, 2005, (describing how Domino’s Pizza, Burger King, Coca-Cola and others are integrating brands into MTV programming).

²⁸ See, e.g., Commercial Alert FTC Complaint at 4; Katherine Neer, *How Product Placement Works*, <http://money.howstuffworks.com/product-placements.htm>.

²⁹ Center for Science in the Public Interest, *Pestering Parents” How Food Companies Market Obesity to Children* 21(Nov. 2003).

kitchen, in commercials on a black-and-white TV, and in the hands of a young artist visiting a college campus.”³⁰ “Meet Mister Mom,” a reality show scheduled to air on NBC in Fall 2005 in which dads compete to run the most efficient household, was actually produced by an advertising agency specifically for the purpose of promoting products.³¹

Nor are product placements limited to movies and television. Some websites targeting children and teens also carry product placements. For example, the Neopets website, which claims to have 25 million mostly “tween-aged” visitors,³² allows children to create and care for a pet by purchasing food, toys, and medicines using Neopoints, which are obtained by playing games, visiting stores on the site, and completing surveys. For example, a child may visit the McDonald’s store or the Disney Theater on the Neopets site.³³ Once at the Disney Theater, children can watch trailers for Disney movies or play Disney-branded games.³⁴ The Habbo Hotel site, “a teen-targeted animated Web world where users can play games, chat and customize characters and rooms,” has integrated a number of brands into its site including Pepsi and Mountain Dew.³⁵

³⁰ Beth Gillin, *Product Placement Turn TV Programs into Commercials*, *Philadelphia Inquirer*, January 23, 2005, at A01.

³¹ Tara Weiss, *Advertiser’s Television*, *The Journal News*, Aug. 19, 2005.

³² Hilary Potekewitz, *Big Media Paying Big to Find Kids*, *Los Angeles Business Journal*, Aug. 1, 2005.

³³ www.neopets.com. See Comments of Children’s Media Policy Coalition et al, Children’s Television Obligation of Digital Television Broadcasters, MM Docket No. 00-167 (filed Apr. 1, 2005) at Ex. A-D (print outs of neopets website).

³⁴ *Id.* Neopets is an interesting example of both product placements and character marketing. The Neopets characters are now being put into McDonald’s Happy Meals. <http://www.neopets.com/happymeal/index.phtml?from=home>. Viacom recently purchased the Neopets website for \$160 million. Hilary Potekewitz, *Big Media Paying Big to Find Kids*, *Los Angeles Business Journal*, Aug. 1, 2005.

³⁵ T.L. Stanley, *Online Habbo Hotel Targets U.S. High-Schoolers*, *Madison & Vine*, Feb. 2, 2005.

Videogames are likely to become another important venue for product placements targeting children and teens. Samsung, which has prominent product placements in the movie “The Fantastic Four,” has also entered into an agreement with video game maker Activision to integrate its brand and products into the video game for the movie.³⁶ An advertising agency, Massive, is placing products in computer and video games for such advertisers as Dunkin’ Donuts and Coca-Cola.³⁷ According to Massive’s CEO, “Advertising is seamlessly integrated into games [and] takes many forms: billboards, posters, branded messages on delivery trucks and computer and TV screens.”³⁸ Massive uses technology that allows different advertisements to be inserted depending on time of day, geography, or other factors.³⁹

Product placements are also turning up in other, less expected places. In recent years, a number of counting and activity books for very young children have featured branded snack foods and cereals.⁴⁰ McDonalds recently hired a marketing firm to encourage hip-hop artists to integrate the Big Mac into their songs.⁴¹

³⁶ Beth Synder Bulik, *Samsung Reloaded is Back in the Movie Game*, Madison and Vine, June 28, 2005.

³⁷ Matt Richtel, *A New Reality in Video Games: Advertisements*, NY Times, Apr. 11, 2005, C1.

³⁸ T.L. Stanley, *Making a Game of Marketing*, Madison & Vine, May 18, 2005. Massive reaches the core gamer population, which is over 70% males 18-34. *Id.* US kids spend an average of 49 minutes per day playing videogames. Kaiser Family Foundation, *Generation M: Media in the Lives of 8-18 Year Olds*, at 31 (Mar. 2005).

³⁹ T.L. Stanley, *Making a Game of Marketing*, Madison & Vine, May 18, 2005. This technology also allows advertisers to monitor the behavior of the gamers. *Id.*

⁴⁰ Schor at 78-79.

⁴¹ Marc Graser, *McDonald’s Buying Way into Hip-Hop Song Lyrics*, Madison & Vine, Mar. 28, 2005. McDonalds will pay a certain amount for each time a song is played on the radio. This article notes that radio airplay not only extends the reach of the brand, but “[i]f a song is getting a lot of airplay, there’s a strong likelihood it will be played in clubs, be downloaded, be turned into a ringtone and sell more CDs.” *Id.*, quoting Tony Rome, President-CEO of Maven Strategies.

A substantial number of the products placed in media used by children are for foods of low nutritional value.⁴² PQ Media found that marketers in the food and beverage, house and home, and health and beauty categories accounted for more than half of all physical product placements in 2004.⁴³ Food or beverage products frequently appear in the top-ten lists of product placements.⁴⁴

B. The Regulation of Product Placements

Product placements have been largely unregulated except for those that appear on broadcast television or radio, which are regulated to a limited extent by the FCC. Section 317 of the Communications Act requires that paid product placements on television and radio be disclosed on the air.⁴⁵ The rationale underlying Section 317 is that “an advertiser would have an unfair advantage over listeners if they could not differentiate between the program and the commercial message and were, therefore, unable to take its paid status into consideration in assessing the message.”⁴⁶ However, Commercial Alert has alleged that the FCC has failed to enforce Section 317’s disclosure requirements in the case of product placements broadcast by

⁴² See generally *Pestering Parents* at 21-22.

⁴³ PQ Media at 7.

⁴⁴ See, e.g., *IAG Top 10 Most-Recalled Product Placements in Network Sitcoms, Feb. 14-March 13, 2005*, Madison & Vine, Mar. 16, 2005 (Hostess’s Twinkie in NBC’s *Scrubs* ranked second); *Nielsen Product Placement Report: Coke Classic Tops List for Week of May 9-15, 2005*, Madison & Vine, June 1, 2005 (Coca-Cola Classic appeared 111 time; PepsiCo’s Gatorade ranked second with 92 appearances and Sierra Mist ranked seventh with 54 appearances).

⁴⁵ 47 USC §317. Disclosure is generally required whenever a station broadcasts matter in exchange for “any money, service, or other valuable consideration.” *Id.* at §317(a)(1). Section 508 requires that any person who supplies a program to a broadcast station shall disclose whether payment has been made for the inclusion of any program matter. In cases of such disclosure, §317(b) requires stations to make an announcement regarding the payment. In addition, station licensees are required to “exercise reasonable diligence” to obtain the information needed to make an appropriate announcement. The FCC rules implementing this statute may be found at 47 CFR §73.1212.

⁴⁶ *Children’s Policy Statement*, 50 FCC 2d at 15, citing Hearings on H.R. 5589 before the House Committee on the Merchant Marine and Fisheries, 69th Cong., 1st Sess. p. 83 (1926).

major television networks and to update its rules to address current product placement practices.⁴⁷ Although Commercial Alert's request for investigation has been pending for two years, the FCC has taken no action in response.⁴⁸

The FCC also has a policy prohibiting product placements in programs originally produced and broadcast primarily for children ages 12 and under. In 1971, the FCC initiated a wide-ranging inquiry into children's programming and advertising practices at the request of Action for Children's Television (ACT). This inquiry resulted in the issuance of the 1974 *Children's Television Report and Policy Statement*.⁴⁹ While the FCC declined ACT's request to eliminate all commercials on programs designed for children and prohibit any use or mention of any product by brand name, it nonetheless adopted some important restrictions in implementing its statutory responsibility to "insure that broadcasters do not engage in excessive or abusive advertising practices."⁵⁰

The *1974 Policy Statement* did not explicitly address the practice of product placements, but did express concern that many broadcasters were not maintaining adequate separation between programming and advertising on programs designed for children.⁵¹ Thus, the FCC adopted a policy requiring a clear separation between program and commercial content, the

⁴⁷ Letter from Gary Ruskin, Executive Director of Commercial Alert to Marlene H. Hortch, Secretary, FCC, Sept. 30, 2003. Commercial Alert is a non-profit organization whose "mission is to keep the commercial culture within its proper sphere, and to prevent it from exploiting children." www.commercialalert.org.

⁴⁸ Commissioner Adelstein has urged the FCC to act on this and other related matters. *See, e.g.*, Remarks of Commissioner Jonathan S. Adelstein, at the National Conference for Media Reform, St. Louis, Mo., 2005 FCC LEXIS 2949 (May 14, 2005).

⁴⁹ 50 FCC 2d 1 (1974). *See also Applicability of Sponsorship Identification Rules*, 40 F.C.C. 141 (1963), as modified, 40 Fed. Reg. 41936 (1975) ("Listeners are entitled to know by whom they are being persuaded.").

⁵⁰ 50 FCC 2d at 8-9.

⁵¹ *Id.* at 14.

effect of which is to prohibit product placements in the programs originally designed and aired for children aged 12 and under.

However, the FCC policies do not apply to “programs originally produced for a general audience that might nevertheless be significantly viewed by children.”⁵² This explains why television programs watched by large numbers of children, such as “American Idol,” are allowed to contain product placements (although they should be disclosed). Moreover, FCC rules exempt motion pictures that are shown on television from its disclosure requirements.⁵³ While the FCC’s children’s advertising policies have been extended to cover children’s programming on cable television and direct broadcast satellites,⁵⁴ the FCC lacks the jurisdiction to regulate product placements in motion pictures, video games, magazines, songs, and books.

In contrast to the FCC, the FTC has broad jurisdiction over advertising practices regardless of the medium.⁵⁵ However, in 1992, the FTC declined to take any action against product placements in movies.⁵⁶ More recently, the FTC staff denied a request by Commercial Alert to investigate product placement practices on television.⁵⁷

⁵² *Policies and Rules Concerning Children’s Television*, 6 FCC Rcd 2111, 2112 (1991).

⁵³ 47 CFR §73.1212(h); *Amendment of Sponsorship Identification Rules*, 34 FCC 829 (1963).

⁵⁴ 47 USC 303a(d) (applying advertising limits to cable television operators); *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, 19 FCC Rcd 5647, 5668 (2004) (applying advertising limits to DBS).

⁵⁵ §5, Federal Trade Commission Act, 15 USC §45(a)(1).

⁵⁶ In May 1991, the Center for the Study of Commercialism and others alleged that major motion picture studios were engaging in unfair and deceptive practices through the use of product placements in motion pictures. (A copy of their Complaint and Request for Investigation and Rulemaking is available on Westlaw and Lexis). The FTC denied the petition, concluding that “[d]ue to the apparent lack of a pervasive pattern of deception and substantial consumer injury attributable to product placements, ... an industry-wide rulemaking is inappropriate at this time.” *FTC Denies CSC’s Petition to Promulgate Rule on Product Placement in Movies*, Dec. 11, 1992, available at www.ftc.gov/opa/predawn/F93/csc-petit5.htm.

⁵⁷ FTC Staff Letter.

Commercial Alert documented the growth in scope, sophistication and intensity of product placements and argued that use of product placements is “deceptive because it flies under the viewer’s skeptical radar. It is unfair because it is advertising that purports to be something else.”⁵⁸ Commercial Alert alleged that the failure to disclose embedded advertising was deceptive or unfair under the meaning of the Federal Trade Commission Act.⁵⁹ To support this argument, Commercial Alert cited numerous cases in which the FTC had required marketers to disclose that advertising that appeared to be something else such, as a television program, newspaper article, or internet search result, was really a paid advertisement.⁶⁰ While the bulk of Commercial Alert’s request focused on product placements in general, it expressed concern that embedded ads could get past the guard of watchful parents and trigger cravings for products that parents might oppose, such as junk food. Commercial Alert cited several examples of product placements for soda, fast food, and even beer in programs watched by large numbers of children.⁶¹

In February 2005, the FTC’s Director for Advertising Practices denied Commercial Alert’s request to require greater disclosure of product placements.⁶² As to adult viewers, the letter stated that the staff was not aware of any empirical data about whether consumers distinguish between paid and non-paid product appearances. Even assuming, however, that consumers are not aware of paid appearances, the letter concluded that the failure to identify paid

⁵⁸ Letter from Gary Ruskin, Executive Director Commercial Alert to Donald Clark, Secretary, Federal Trade Commission at 2 (Sept. 30, 2003)(Commercial Alert FTC Complaint).

⁵⁹ *Id.*

⁶⁰ *Id.* at 2-3.

⁶¹ *Id.* at 12-13. It also noted that fast food company Taco Bell had entered into a brand integration deal with Discovery Networks, which operates several cable networks with a substantial child audience. *Id.* at 13.

⁶² Letter from Mary K. Engle, Assoc. Director for Advertising Practices, FTC to Gary Ruskin, Exec. Dir., Commercial Alert (Feb. 10, 2005)

product placements as advertising did not violate Section 5 of the Federal Trade Commission Act. It explained that the principal reason to identify something as an advertisement is that consumers may give more credence to representations about a product's performance or other attributes if they are made by an independent third party than an advertiser. It cites as an example, *JS&A Group, Inc.*,⁶³ which concerned an infomercial for BluBlocker sunglasses that appeared to be an independent news program. In contrast,

in product placement, few objective claims appear to be made about the product's performance or attributes. That is, in most instances the product appears on-screen (e.g. American Idol hosts are seen drinking from cups with the Coca Cola logo), or is mentioned, but the product's performance is not discussed.⁶⁴

Thus, the FTC staff letter concluded that the rationale for disclosure was absent.

The FTC staff applied the same reasoning to Commercial Alert's request for investigation of product placements seen by children. The FTC noted that because of the special vulnerabilities of children, it examined whether an advertisement was deceptive from the standpoint of an "ordinary child." Nonetheless, "[i]f no objective claims are made for the product, then there is no claim as to which greater credence could be given; therefore, even from an ordinary child's standpoint, consumer injury from an undisclosed paid product placement seems unlikely."⁶⁵

In sum, although product placements have been used for many years and have increased substantially in recent years, federal agencies have taken little or no action to restrict them or ensure that they are not deceptive or misleading.

⁶³ 111 FTC 522 (1989)(consent order).

⁶⁴ FTC Staff Letter at 3.

⁶⁵ *Id.* at 4. While denying Commercial Alert's request, the FTC staff noted that would continue its policy of evaluating whether an advertising format is deceptive on case-by-case basis, and that to the extent that specific uses of product placements could be demonstrated to likely cause consumer injury, the FTC could bring enforcement actions. *Id.* at 5.

II. CHARACTER MARKETING

Characters have been used to market products for over a hundred years.⁶⁶ Some characters associated with certain products or brands have been developed by the advertiser specifically to promote their products. Examples of this type include Chester Cheetah, Tony the Tiger, and Ronald McDonald. Other characters were first developed in children's books, movies, television shows and video games have subsequently (or increasingly now at the same time) have been used to market unrelated products, which are often food products. Researchers refer to this type of character marketing as "celebrity spokes-characters."⁶⁷ Some examples of celebrity spokes-characters include SpongeBob Square Pants, a character from a popular children's program on Nickelodeon, who appears on the packaging for a wide variety of food products including Kellogg's cereal, Cheez-it snack crackers, Poptarts, and Keebler Fudge cookies.⁶⁸ Another example would be the common practice of fast food restaurants of putting toy characters from popular children's movies into their children's meals. This article proposes limits only on the use of celebrity spokes-characters.⁶⁹

⁶⁶ Judith A. Garretson & Ronald W. Niedrich, *Spokes-Characters--Creating Character Trust and Positive Brand Attitudes*, 33 J. of Advertising 25 (2004).

⁶⁷ *Id.* at 25-36. This article defines "spokes-characters" as "nonhuman characters used to promote a product or a brand. . . . These characters aren't cartoons originally created for animated movies, cartoon programs, and/or comic strips and then licensed by brands to appear in promotions. Rather they are created for the sole purpose of promoting a product or brand." *Id.* at 25. Another article uses the term "celebrity spokes-characters" to refer to spokes-characters of a non-advertising origin that can be licensed to endorse products. Margaret F. Callcott and Wei-Na Lee, *A Content Analysis of Animation and Animated Spokes-Characters in Television Commercials*, 23 J. of Advertising 1 (1994).

⁶⁸ See www.kelloggs.com/promotions/spongebobsquarepants/nautical.html.

⁶⁹ The proposal is limited to celebrity spokes-characters because spokes-characters developed for advertising campaigns generally do not take advantage of children and pose the same risk of confusion as characters developed in a book, movie or television program that are used to market an unrelated product. However, even characters developed for a marketing campaign may be used in an unfair or deceptive manner. For example, it has been argued that the use of the character Joe Camel was unfair because it promoted a product to children that was illegal for them to purchase. See Joel B. Cohen, *Playing to Win: Marketing and Public Policy at Odds over*

A. The Practice of Celebrity Spokes-Character Marketing

In most cases, advertisers pay a license fee for the right to use a popular character as a toy or in an advertisement. Licensing has become big business. In 2004, licensing fees in the entertainment/character category in the US amounted to \$2.57 billion, a \$63 million (2.5%) increase over the 2003 “in large part due to the successful licensing programs for 2004 mega-hits such as Spider-Man 2 and Shrek 2.”⁷⁰

A related practice is cross-selling, in which two or more companies combine promotion efforts. For example, the 1990 movie “Teenage Mutant Ninja Turtles” was promoted by Burger King before it opened and Burger King was prominently featured in the movie.⁷¹ Cross-licensing has become standard practice for children’s movies. Dreamworks, which produced the Shrek movies, recently entered into a two-year global marketing and promotional relationship with McDonalds that will enable McDonalds to integrate the characters from “Shrek 3” into its year-round marketing.⁷² For the last nine years, McDonalds has had an exclusive relationship with Disney, “doing a series of commercials and Happy Meal promotions with Disney properties like ‘101 Dalmations,’ ‘Finding Nemo’ and ‘Inspector Gadget.’”⁷³ According to McDonald’s

Joe Camel, 19 J. of Public Policy & Marketing 155 (2000). Moreover, in 1992, Fox Television network had planned to broadcast a cartoon program based on Chester Cheetah. After Action for Children’s Television and others asked the FCC to declare that the program would violate its separations policy, Fox decided to drop the program. *Groups rap Chester Cheetah show idea*, Advertising Age, Mar. 9, 1992, at 8.

⁷⁰ Patricia Odell, *Live from the Licensing Show: Royalties Flat, Entertainment and Character Licensing Booming*, PROM Xtra, June 22, 2005, available at <http://promomagazine.com/news/licensing0622/>.

⁷¹ Consumers Union’s Educational Services Division, *Selling America’s Kids: Commercial Pressures on Kids* (Jan. 1, 1998), available at www.consumersunion.org/other/sellingkids.

⁷² T.L. Stanley and Kate MacArthur, *McDonald’s Signs Two_year Deal with Dreamworks*, Madison & Vine, July 27, 2005.

⁷³ Melanie Warner, *McDonald’s Reaches Deal with Studio*, NY Times, July 28, 2005, C7.

President and Chief Operating Officer, the tie-ins with Disney movies had been some of the company's most successful Happy Meal promotions.⁷⁴

Spokes-character marketing has also become a common practice on children's websites. The Center for Media Education first identified the problem of spokes-character marketing to children in its 1996 report, *Web of Deception*. This report noted that "[i]n the online world, the [FCC's] no-host [selling] principle is not only being violated, but hosts are also being used to interact with character in exploitative new ways."⁷⁵ It described how many children's websites encourage to children to interact with spokes-characters and use spokes-characters to promote and even sell products online.⁷⁶

Today, virtually every children's television website has an online shop where one can buy product merchandise associated with the programs or program characters.⁷⁷ Moreover, on many children's media websites, program characters promote unrelated products using a variety of techniques including banners ads,⁷⁸ contests,⁷⁹ and advergames.⁸⁰ Further, some children's

⁷⁴ *Id.*

⁷⁵ Center for Media Education, *Web of Deception: Threats to Children from Online Marketing* 16 (1996).

⁷⁶ *Id.* at 17.

⁷⁷ For example, when a child clicks on the "shop" button on www.nick.com, it will take her to an area selling hundreds of items – games, toys, clothing, home furnishing – associated with Nickelodeon characters, that can be viewed by program, age, or type of merchandise. Disney, Cartoon Network, and even PBSKids and Sesame Workshop have similar shopping areas on their websites.

⁷⁸ See, e.g., Comments of Children's Media Policy Coalition's Opposition to Petitions for Reconsideration of FCC's Children's Television Obligations of Digital Television Broadcasters, Docket No. MM 00-176 at 24, n.104 (showing banner advertisement of SpongeBob promoting Virgin Mobile cellphone service reproduced from www.nickelodeon.com website).

⁷⁹ For example, the Foxkids website invited kids to enter a Teenage Mutant Ninja Turtle Monster Candy contest co-sponsored by Pez candies. <http://foxkids.com/promotions/tmntmonstercandy/> (visited 9-1-05).

⁸⁰ For example, the Nickelodeon website (<http://www.nick.com/ads/kelloggs/spongebob/>) has an advergame promoting both the "SpongeBob SquarePants Movie" and several Kellogg's products--SpongeBob Cereal, Cheez-it Crackers, Pop-tarts, and Eggo Waffles. The site offers

media websites provide children with a direct link to product websites. For example, on the Cartoon Network's website,⁸¹ a child may click on a banner advertisement for Pop-tarts and immediately be sent to a Pop-tarts website, where characters from the movies "Robots" and "Star Wars" are featured on Pop-tarts boxes.⁸²

Character marketing remains a popular marketing technique in television commercials as well. As one study notes, "[a]lthough celebrity characters from Buster Brown to Mickey Mouse to the Flintstones have endorsed a variety of products throughout advertising history, they have been especially visible in recent years."⁸³ This study analyzed the content of commercials on broadcast and cable networks.⁸⁴ It found that animated ads appeared most frequently during children's programming and cartoons, more than half of the animated commercials featured animated characters, and about 27.9% of spokes-characters were classified as "celebrity characters."⁸⁵ The study found that the "majority of animated characters appeared for products in the cereal/fruit/vegetable, candy/snacks, food/beverage and games/toys categories."⁸⁶

Linn has also noted the extensive use of characters to market food to children:

two interactive games. In "The Diner," children serve food to hungry customers. Of course, every customer wants the the SpongeBob cereal or other Kellogg's brand featuring SpongeBob on the package. In the "Kellogg's Supermarket Challenge," the object is to beat the clock by picking up the Kellogg's products that have been "dropped" in the Supermarket and put them back where they belong. In addition, children can win a screen saver by naming one of the four things represented by the marshmallow pieces in the SpongeBob cereal.

⁸¹ http://www.cartoonnetwork.com/tv_shows/index.html.

⁸² <http://www.poptarts.com/promotions/poptarts/>

⁸³ Callcott at 2-3.

⁸⁴ *Id.* at 4-5. Of the six networks studied, *i.e.*, Nickelodeon, Fox NBC, MTV, CBS, CNN and ABC, Nickelodeon had by far the highest percentage of animated advertisements. Moreover, a larger number of animated advertisements were broadcast during dayparts that were likely to contain programming watched by children and teenagers than during other dayparts.

⁸⁵ Callcott at 6-7. The characters appearing most often were Fred Flintstone and Barney Rubble. Interestingly, this study found that animated spokes-characters were also used to promote products to adults.

⁸⁶ Callcott at 11.

Most of the movies and many of the TV programs children watch are marketed with off-screen food promotions. Once a program is associated with a particular brand, the program itself becomes an ad for that food. Visit any supermarket and you'll find the shelves filled with examples of these links between the media and food manufacturers...Tie-ins like these are designed to lure children into selecting foods associated with favorite movie or TV characters.⁸⁷

Even characters from children's programs shown on public broadcasting stations, such as "Sesame Street" and "Arthur," which are supposed to provide a non-commercial alternative for children, are frequently used to promote food products to children.⁸⁸

B. The Regulation of Spokes-Character Marketing

Like product placements, spokes-character marketing has been largely unregulated. Only one form of character marketing to children known as "host-selling" has been restricted by the FCC since the mid-1970s. At that time, the two primary methods of advertising to children were broadcast television and print. The FCC adopted a policy against "host-selling," which limited character marketing on television programs in which the character appeared. The Children's Advertising Review Unit (CARU) adopted guidelines restricting character based marketing in print media. The FTC found the use of a celebrity spokes-character to be unfair or deceptive in one case in 1977, but has not brought any actions against character marketing to children since that time.

⁸⁷ Susan Linn, *Consuming Kids* 97 (2004). *See also* *Pestering Parents* at 25-26.

⁸⁸ *Id.* (describing juice boxes adorned with characters from "Sesame Street"). *See also* California Endowment, *Food and Beverage Industry Marketing Practices Aimed at Children* 11(Nov. 2003)(picturing characters from PBS program "Arthur" on package of Brach's fruit snacks). The practice of licensing characters from PBS shows has increased substantially in the last decade. This may be attributed to the fact that at the 1995 congressional hearings, "Republicans chided PBS for not benefiting from the huge amount of money Barney, the popular purple dinosaur, was making for its parent company. Nor did PBS initially get money from the licensing of *Sesame Street* merchandise." Susan E. Linn and Alvin F. Poussaint, *The Trouble with Teletubbies*, *The American Prospect*, May 1, 1999. Subsequently, PBS renegotiated its deals with the producers of children's programs to share in the profits from the licensing of these characters. *Id.*

1. FCC Regulation of Host-Selling

In its *1974 Policy Statement*, the Commission defined “host selling” as “the use of program characters to promote products.”⁸⁹ The Commission found that host selling took unfair advantage of children in two ways. First, the interweaving of program and commercial content exacerbated the difficulty children have distinguishing between the two.⁹⁰ Second, host-selling took “unfair advantage of the trust which children place in program characters. Even performers themselves recognize that, since a special relationship tends to develop between hosts and young children in the audience, commercial messages are likely to be viewed as advice from a friend.”⁹¹

The Commission limited its prohibition against hosts promoting products during or adjacent to the programs in which they appeared. It decided not to prohibit children’s program hosts from promoting products in commercials shown at other times. The FCC noted that “[p]ublic interest questions may also be raised when program personalities or characters deliver commercial messages on programs other than the ones on which they appear” because it takes advantage of the “trust relationship which has been developed between the child and the performer.”⁹² However, the FCC was concerned that it was “not be feasible, as a practical matter, for small stations with limited staffs to avoid using children’s show personnel in commercial messages on other programs.” This reasoning is no longer valid today as stations rarely produce their own children’s programs or commercial messages using station staff.

Moreover, most host-selling problems today arise in the context of animated characters, rather than human hosts. Although the FCC initially conceived of host-selling as the pitching of

⁸⁹ 50 FCC 2d at 16, ¶51.

⁹⁰ 50 FCC 2d at 16, ¶52.

⁹¹ *Id.*

⁹² *Id.* at n.20.

products by human hosts of children's programs, subsequent FCC cases make it clear the host-selling encompasses promotion of products by non-human and animated characters as well by human hosts.⁹³ In recent years, the FCC has admonished several television stations for violating the policy against host selling.⁹⁴

In the fall 2004, the FCC updated its children's advertising policies. Among other things, it extended its host-selling policy to prohibit the display of website addresses on children's television programs (or advertisements during children's programs) when the website uses characters from the program to sell products or services.⁹⁵ This change has been strongly opposed by the major children's networks and advertisers, who have asked the FCC to reconsider this decision.⁹⁶

2. CARU Guidelines

CARU is a self-regulatory arm of the National Advertising Review Council, an organization formed by the Association of National Advertisers, American Association of Advertising Agencies, American Advertising Federation, and Council of Better Business Bureaus.⁹⁷ It is a private organization funded by industry, with no enforcement powers.

⁹³ See, e.g., *Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 5093, 5097, ¶18 (1991); *Dr. Frederick Breitenfeld, Jr. President, WHYY, Inc.*, 7 FCC Rcd 7123, 7123 (1992)(noting that in earlier case it established that "advertisements featuring the same type of animation that is regularly featured in the accompanying program constitutes host-selling").

⁹⁴ See, e.g., *Gary M. Cocola*, 15 FCC Rcd 9192 (2000)(admonished for airing commercials for Post Cereal Golden Crisp featuring Looney Toon characters during the Warner Brothers Kids' Block); *Paramount Stations Group of Houston, Inc.*, 13 FCC Rcd 21816 (MMB 1998)(finding broadcast of commercial for Honey Nut Cheerios featuring "Sonic the Hedgehog" during the "Sonic the Hedgehog" program violated policy against host selling).

⁹⁵ *Children's Television Obligations of Digital Television Broadcasters*, 19 FCC Rcd 22943, 22961 (2004).

⁹⁶ See, e.g., *Petition for Reconsideration of Nickelodeon, Children's Television Obligations of Digital Television Broadcasters*, MM Docket No. 00-167, at 18-25 (filed Feb. 2, 2005).

⁹⁷ See www.caru.org.

The CARU Guidelines address host selling in a section entitled “Endorsement and Promotion by Program or Editorial Characters.”⁹⁸ The Guidelines note that “[s]tudies have shown that the mere appearance of a character with a product can significantly alter a child's perception of the product. Advertising presentations by program/editorial characters may hamper a young child's ability to distinguish between program/editorial content and advertising.” The Guidelines prohibit the use of “program personalities, live or animated” to sell products “in or adjacent to programs primarily directed to children in which the same personality or character appears,” and also prohibit the advertising of products related to a children’s program during or adjacent to the program.⁹⁹ The Guidelines further advise that “[i]n print media primarily designed for children, a character or personality associated with the editorial content of a publication should not be used to sell products, premiums or services in the same publication.”¹⁰⁰ CARU explains that this section was intended to incorporate the FCC’s proscription against host selling and extend it to print media.¹⁰¹

The CARU Guidelines, however, allow character selling on children’s websites.¹⁰² Moreover, they contain an exception for “character driven” or “product driven” magazines. This exemption has been interpreted broadly to cover the popular children’s magazine, *Nickelodeon*.¹⁰³ Even where the Guidelines advise against a particular practice, compliance with its rulings is purely voluntary.¹⁰⁴

⁹⁸ Self-Regulatory Guidelines for Children’s Advertising 7 (7th ed., 2003) (available at www.caru.org/guidelines.pdf) (“CARU Guidelines”).

⁹⁹ CARU Guidelines at 8 (§§3 & 4).

¹⁰⁰ *Id.* (§5). However, in “character driven” or “product driven” magazines or Websites, the prohibition against advertising related products does not apply. *Id.* (§6).

¹⁰¹ MTV Networks *Nickelodeon Magazine* (Zoey 101), CARU Case Reports 3-4/05, p. 196.

¹⁰² Guidelines 6.

¹⁰³ MTV Networks *Nickelodeon Magazine* (Zoey 101), CARU Case Reports 3-4/05, p. 197. This exception was intended to exempt magazines such as *Barbie*, *American Girl* or *G.I. Joe* which

3. Federal Trade Commission

In one instance, the FTC found that the use of a popular children's character to market to children is unfair or deceptive. In *Hudson Pharmaceutical Corp.*,¹⁰⁵ the FTC alleged that the company had "utilize[d] the endorsements of a hero figure, Spider-Man, who is known for his superhuman strength and abilities and has a special appeal to children" in marketing "Spider-Man Vitamins."¹⁰⁶ The FTC explained that Spider-Man had appeared on a popular children's television program and that the use of a program character in television advertising viewed by children has the "capacity to blur for children the distinction between program content and advertising and to take advantage of the trust relationship developed between children and the program character."¹⁰⁷ Thus, the FTC entered into a consent decree prohibiting the company from advertising the vitamins to children. Since entering into this consent decree in 1977, the FTC has taken no further actions involving character marketing to children.

III. THE NEED FOR LEGISLATION TO RESTRICT PRODUCT PLACEMENTS AND CHARACTER MARKETING TO CHILDREN

As shown above, product placements and character marketing are increasingly being used and directed at children. Moreover, in many cases, the advertised products are unhealthy foods. For this reason, further restrictions on these types of advertising to children could contribute to solving the problem of childhood obesity and public health problems associated with obesity.

contain material related solely to those characters on the theory that children subscribing to those magazines would expect to see advertising for those products. CARU acknowledges that *Nickelodeon Magazine* is not "technically" a product or character-driven magazine because it contains editorial content that is not solely related to Nickelodeon characters. Nonetheless, CARU decided to include it within the exemption.

¹⁰⁴ See generally Angela J. Campbell, *Self-Regulation and the Media*, 51 Fed. Comm. L. J. 711, 735-744 (1999).

¹⁰⁵ 89 FTC 82 (1977)

¹⁰⁶ *Id.* ¶8.

¹⁰⁷ *Id.* ¶11.

To restrict these marketing practices, legislation will be needed. As discussed above, neither the federal regulatory agencies nor the self-regulatory CARU are effectively addressing these problems. While the FCC should be commended for its recent decision to extend its host-selling prohibition to websites advertised on children's television programs, it appears to lack jurisdiction to address the bigger problem of character selling on websites generally. Nor does it have jurisdiction over commercial activity unrelated to broadcasting such as food packaging, or putting characters in children's meals at fast food restaurants.¹⁰⁸

Although the FTC has jurisdiction to address "unfair or deceptive" marketing and advertising practices in interstate commerce,¹⁰⁹ it lacks jurisdiction to adopt rules regarding children's advertising.¹¹⁰ Moreover, the current FTC Chairman, Deborah Majoras, has made it clear that the FTC does not intend to regulate children's advertising.¹¹¹ And, as discussed above, a recent FTC staff letter rejected a request to even investigate the increasingly prevalent practice of product placements.¹¹²

¹⁰⁸ The FCC's jurisdiction is limited to interstate communications by means of wire or radio. 47 U.S.C. §151. *See generally American Library Ass'n v. FCC*, 406 F.3d 689 (2005). Arguably, the FCC could exert jurisdiction over the internet, since it involves communications by wire and radio, but is unlikely to do so.

¹⁰⁹ 15 U.S.C. §45(a)(1).

¹¹⁰ 15 U.S.C. §57a(h). Congress eliminated the FTC's authority to conduct rulemakings regarding children's advertising when it enacted the FTC Improvements Act of 1980. [NOTE I believe that another article in this symposium will discuss what happened and why so may want to x-ref]

¹¹¹ Remarks of FTC Chairman Deborah Platt Majoras, Obesity Liability Conference, Chicago, IL (May 11, 2005). *See also Childhood obesity workshop to focus on self-regulation*, FTC:WATCH No. 657, July 11, 2005, at 6.

¹¹² *See supra* at ____ [discussing Commercial Alert's FTC Complaint].

IV. WOULD LEGISLATION PROHIBITING PRODUCT PLACEMENTS AND CHARACTER MARKETING TO CHILDREN BE CONSTITUTIONAL?

Although legislation could prohibit product placements in children's media and character marketing to children, some will undoubtedly object that such legislation would be unconstitutional.

A. The Commercial Speech Doctrine

Until the Supreme Court's 1976 decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹¹³ advertising generally was not believed to be protected by the First Amendment at all.¹¹⁴ In deciding to accord some protection to commercial speech, the Court emphasized the informational value of advertising for consumers.¹¹⁵ It was troubled by the paternalistic assumption of a regulation that deprived the public of accurate and useful information under the guise of protecting them and stated that the Court should assume that well-informed people will act in their own best interest.¹¹⁶

At the same time, the Court did not hold that commercial speech could never be regulated. False commercial speech could be prohibited even though false political speech could not be. The Court noted that: "Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem."¹¹⁷ It suggested that states could "require that a commercial message appear in such a form, or include additional information, warnings, and disclaimers, to

¹¹³ 425 U.S. 748 (1976).

¹¹⁴ See, e.g., *Valentine v Chrestensen*, 316 U.S. 52, 54 (1942).

¹¹⁵ 425 U.S. at 765 ("Advertising, however tasteless and excessive it sometimes may seem, in nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.")

¹¹⁶ *Id.* at 770.

¹¹⁷ *Id.* at 771.

prevent it from being deceptive.”¹¹⁸ The Court concluded that the First Amendment “does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”¹¹⁹

The following year, the Court applied the reasoning of *Virginia Pharmacy* to advertising by attorneys. In *Bates v. State Bar of Arizona*,¹²⁰ the Court found that an Arizona state bar’s prohibition on attorney advertising violated the First Amendment. As in *Virginia Pharmacy*, the Court was concerned with protecting the public’s interest in obtaining information needed to make informed decisions.¹²¹ While the Court rejected the claim that all advertising by attorneys was inherently misleading, it emphasized that the advertising here pertained only to routine services.¹²² The Court stressed that advertising that was false, deceptive, or misleading would continue to be subject to regulation. Further, “because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.”¹²³ The Court gave two examples of possible deceptive advertising: claims as to quality of service, because they are “not susceptible of measurement or verification,” and in-person solicitation.¹²⁴

In *Ohralik v. Ohio State Bar Ass’n*, the Court took up the question of in-person solicitation, upholding sanctions against an Ohio lawyer for soliciting young accident victims immediately after the accident.¹²⁵ While noting that the Court had previously held in *Bates* that

¹¹⁸ *Id.* at n. 24.

¹¹⁹ *Id.* at 771-72. Justice Stewart concurred, writing separately to explain why the Court’s decision did not preclude government regulation of false or deceptive advertising. *Id.* at 776.

¹²⁰ 433 U.S. 350 (1977).

¹²¹ *E.g., Id.* at 374-75.

¹²² *Id.* at 372-73, 383-84.

¹²³ *Id.* at 383-84.

¹²⁴ *Id.*

¹²⁵ 436 US 447, 449-50 (1978)(one victim was still in the hospital).

truthful, restrained advertising regarding routine legal services was protected by the First Amendment, in-person solicitation presented a different kind of advertising than *Bates*.¹²⁶ The Court was concerned that in-person solicitation would exert pressure and demand an immediate response without time for reflection.¹²⁷

In *Friedman v. Rogers*,¹²⁸ the Court upheld a Texas law prohibiting the practice of optometry under a trade name. While acknowledging that a trade name was a form of commercial speech, the Court found that it differed significantly from the commercial speech at issue in *Virginia Pharmacy* and *Bates* because those cases involved statements about the product or services offered and their prices. In contrast, “a trade name conveys no information about the price and nature of services offered by [a professional] until it acquires meaning over a period of time by associations formed in the minds of the public...[T]hese ill-defined associations of trade names with price and quality information can be manipulated.”¹²⁹ Thus, the Court concluded that there was a significant possibility that the use of trade names would be used to mislead the public. Since factual information about the businesses could be communicated directly to the public, Texas had done no more than require that information about optometry services appear in a form necessary to prevent deception.

In its 1980 decision in *Central Hudson Gas & Electric Corp. v Public Service Commission*,¹³⁰ the Court articulated the four-prong test for analyzing the constitutionality of restrictions on commercial speech that has been applied in all subsequent commercial speech cases:

¹²⁶ *Id.* at 454-55.

¹²⁷ *Id.* at 457.

¹²⁸ 440 U.S. 1 (1979),

¹²⁹ *Id.* at 13.

¹³⁰ 477 U.S. 557 (1980).

For commercial speech to come within [First Amendment Protection], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.¹³¹

Noting that the First Amendment concern for commercial speech was based on the informational function of advertising, the Court observed that “[c]onsequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it.”¹³² In *Central Hudson*, however, none of the parties claimed that the advertising by electric utilities at issue was misleading, and the Court found that the prohibition on truthful, non-misleading advertising was unconstitutional because it failed the fourth prong of the test.

Although many have criticized the commercial speech doctrine generally and the *Central Hudson* test in particular,¹³³ the Court continues to apply it.¹³⁴ Most Supreme Court decisions finding restrictions unconstitutional under the *Central Hudson* test have involved truthful, nonmisleading speech.¹³⁵ Only three cases decided after *Central Hudson* involve speech that was alleged to have been misleading.

¹³¹ *Id.* at 566.

¹³² *Id.* at 563.

¹³³ See, e.g., *44 Liquormart*, 517 U.S. at 520–522, (Thomas, J., concurring)(arguing that commercial speech should be afforded the highest level of protection under the First Amendment); Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?* 76 Va. L. Rev. 627 (1990).

¹³⁴ See, e.g., *Thompson v. Western States Medical Center*, 535 U.S. 357, 367-68 (2002) (noting that although some members of the Court had expressed doubts about *Central Hudson*, there was “no need to break new ground.”); *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 184 (1999)(noting that while “certain judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard,” *Central Hudson* provided an adequate basis for decision here).

¹³⁵ See *In re R.M.J.*, 455 US 191, 203 (1982)(finding unconstitutional prohibition against lawyer advertising including truthful and nonmisleading information about practice areas); *Bolger v.*

In *Zauderer v. Office of Disciplinary Counsel*,¹³⁶ an Ohio attorney was disciplined for running an advertisement offering to represent clients who were injured by the Dalkon Shield. The Ohio Supreme Court had found the advertisement misleading in several respects. The US Supreme Court overturned the sanction for running an advertisement that contained an illustration of the Dalkon Shield. It found that none of the statements in the advertisement were false or deceptive. Moreover, it rejected the state's contention that illustrations posed an unacceptable risk that the public would be misled, manipulated or confused because the state cited no evidence to support this claim.¹³⁷

However, the Court upheld the sanction for omission of information regarding the lawyer's contingent-fee arrangements, noting that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, [the attorney's] interest in *not* providing any particular factual information in his advertising is minimal."¹³⁸ It held that disclosure need only be "reasonably related to the state interest in preventing deception of consumers" and that here, the public was likely to be misled because members of the public were unlikely to be aware of the technical

Youngs Drug Prods., 463 U.S. 60, 66 (1983)(statute prohibiting unsolicited mailing of truthful and nonmisleading contraceptive ads unconstitutional restriction on commercial speech); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988)(unconstitutional to categorically prohibit lawyers from soliciting business by sending truthful and nondeceptive letters to potential clients); *Edenfield v. Fane*, 507 U.S. 761 (1993); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995)(prohibition on nonmisleading display of alcohol content on beer labels violated First Amendment); *44 Liquormart, Inc. v. Rhode Island*, (1996)(prohibition on truthful advertising of liquor prices unconstitutional); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999)(finding unconstitutional restrictions on broadcast of truthful advertising for legal gambling casinos); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)(finding unconstitutional various state restrictions on truthful advertising of tobacco products); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002)(law prohibiting pharmacists from truthfully advertising that they could compound drugs unconstitutional).

¹³⁶ 471 US 626, 642 (1985).

¹³⁷ *Id.* at 648.

¹³⁸ *Id.* at 651.

distinction between fees and costs.¹³⁹ The Court concluded that “[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to ‘conduct a survey of the ... public before it [may] determine that the [advertisement] had a tendency to mislead.’”¹⁴⁰

In *Peel v. Attorney Registration and Disciplinary Commission*, the Court held that an attorney had a First Amendment right to include the fact that he is certified as a trial specialist on his letterhead.¹⁴¹ Although the Illinois Commission had found the inclusion of this information misleading, a closely divided Court disagreed.¹⁴² Five Justices thought the letterhead was potentially misleading, but disagreed as to whether the state should be allowed to ban it or only require additional information.¹⁴³ Justice Stevens’ decision for the Court emphasized that the facts stated on the letterhead were true and verifiable and that no one contended that any person had actually been misled. He “reject[ed] the paternalistic assumption that the recipients of petitioner’s letterhead are no more discriminating than the audiences for children’s television.”¹⁴⁴ He concluded that while the state may take action against sham certifications or require disclaimers, it could not completely ban information about certification that was useful to consumers.

¹³⁹ *Id.* at 651-52.

¹⁴⁰ *Id.* at 652-53 (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-392 (1965)).

¹⁴¹ 496 U.S. 91, 110-111 (1990).

¹⁴² *Id.* at 110.

¹⁴³ Justice Marshall, joined by Justice Brennan, concurred, noting that although the letterhead was not actually misleading, it was potentially misleading and that the state may enact measures other than total ban such as requiring a disclaimer. *Id.* at 111. Justice White dissented based on his belief that the speech was potentially misleading and that state should be allowed to ban the letterhead in present form. *Id.* at 118. Justice O’Connor joined by Justices Rehnquist and Scalia also dissented. She thought the letterhead was likely to mislead public and that additional disclosures would be unlikely to alleviate the problems. She argued that “if the information cannot be presented in a way that is not deceptive, even statements that are merely potentially misleading may be regulated with an absolute prohibition.” *Id.* at 125.

¹⁴⁴ *Id.* at 105 (citing *Bolger*, 463 U.S. at 74).

Finally, in *Ibanez v. Florida Dept. of Business*,¹⁴⁵ the Court overturned a sanction against an attorney who had accurately identified herself as a Certified Public Accountant and a Certified Financial Planner. The Florida CPA Board argued that her use of these designations was either inherently or potentially misleading. While the two dissenters agreed that the designations were misleading, the majority stressed that the information was true and that the Board had failed to point to any harm not “purely hypothetical.”¹⁴⁶

B. Are Product Placements and Character Marketing Commercial Speech?

When the commercial speech doctrine is applied to the proposed legislation prohibiting the use of product placements and character marketing to children, the threshold question is whether these forms of marketing are commercial speech. One critique of the Supreme Court’s commercial speech doctrine is that it is sometimes difficult to tell what constitutes commercial

¹⁴⁵ 512 U.S. 141, 143 (1994).

¹⁴⁶ *Id.* at 146. *Florida Bar v. Went for It*, 515 U.S. 618 (1995), did not involve commercial speech that was claimed to be deceptive or misleading. Nonetheless, the Court upheld a Florida bar rule prohibiting personal injury lawyers from sending targeted direct mail solicitations to victims and their relatives for 30 days following an accident or disaster on the ground that the state has a substantial interest in protecting privacy of personal injury victims against intrusive, unsolicited contact by lawyers and in protecting the reputation of the legal profession. It emphasized that here, in contrast to its 1993 decision in *Edenfield*, which held unconstitutional a complete ban against in-person solicitation by CPAs, the record contained “data--both statistical and anecdotal--supporting the Bar’s contentions that the FL public views direct-mail solicitation in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession.” *Id.* at 626. The Court found a reasonable fit between the ends and means because the prohibition was limited to a brief period and many alternative ways remained for lawyers to advertise and people to learn about availability of legal representation. *Id.* at 632. Two other Supreme Court decisions also upheld restrictions on truthful and non-misleading advertising. *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986), which upheld prohibitions against advertising of casinos to residents of Puerto Rico, and *United State v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), which upheld a restriction on the broadcast of lottery advertisements by a radio station licensed to a state where lotteries were illegal, were found to meet the *Central Hudson* test because they served the states’ interest in protecting citizens from the ills associated with gambling.

speech.¹⁴⁷ However, in the case of product placements and character marketing, it seems clear that the speech at issue is commercial speech.

In *Bolger v. Youngs Drug Products Corp.*, the Supreme Court examined three factors, which taken together, supported the conclusion that the speech at issue was properly classified as commercial speech: 1) whether the speech was advertising; 2) whether it referred to a specific product; and 3) whether the speech served the economic interest of the speaker.¹⁴⁸ Each of these factors applies to paid product placements. Product placements are undoubtedly a type of advertising. As discussed above, advertising agencies find placement opportunities in films, television programs, and other media, and advertisers pay for the right to have their product placed. Product placements involve the appearance or mention of a specific product or brand. And clearly, products placements serve the economic interests of the advertisers.¹⁴⁹

Advertisements featuring celebrity spokes-characters also fit easily within the three *Bolger* factors--they are a form of advertising, refer to specific products and serve the economic interests of the speaker. Some types of character marketing, however, may not be considered speech at all. For example, when a fast food restaurant enters into a licensing agreement with a movie producer that allows it to use the characters as toys in children's meals, this could be viewed as pure economic activity subject to rational basis review rather than speech. Invariably in such deals, however, the characters also appear in television, print and website advertisements. This type of advertising would constitute commercial speech as well as economic activity. Moreover, given that the Supreme Court has found letterhead and beer labels are commercial

¹⁴⁷ See, e.g., David Vladeck, *Lessons from a Story Untold: Nike v. Kasky Reconsidered*, 54 Case Western Reserve L. Rev. 1049, 1060 (2004).

¹⁴⁸ 463 U.S. 60, 66-67 (1983).

¹⁴⁹ I am not claiming that the existence of product placements converts the entire movie, television program or video game into commercial speech. Rather, the product placement itself is the commercial speech.

speech,¹⁵⁰ it would likely find that the depiction of characters on packaging is commercial speech.

C. Are Product Placements and Character Marketing Misleading?

Because product placements and character marketing are commercial speech, the four part *Central Hudson* test applies. Under the *Central Hudson* test, the Court asks “as a threshold matter whether the commercial speech concerns unlawful activity or is misleading. If so, then the speech is not protected by the First Amendment.”¹⁵¹

1. Evidence of Deception

Congress could point to a substantial body of academic research to support a finding that these forms of advertising are misleading to children.

A great deal of research has been done on how children understand traditional television advertising.¹⁵² As noted above, this research formed the basis for the FCC’s restrictions on children’s advertising in the 1974 *Policy Statement* and for the CARU Guidelines. Research conducted since the 1970s has confirmed that children do not fully understand advertising until approximately age eight.¹⁵³

As Kunkel explains, for children to fully comprehend advertising messages:

¹⁵⁰ *Peel v. Attorney Reg.*, 496 U.S. at 99-100 (letterhead); *Rubin v. Coors Brewing Co.*, 514 U.S. at 481 (beer labels).

¹⁵¹ *Thompson v. Western States Medical Center*, 535 U.S. at 367.

¹⁵² For a more detailed summary of research about children’s understanding of advertisements, see Barrie Gunter, Caroline Oates, and Mark Blades, *Advertising to Children on TV: Content, Impact and Regulation* (2005) and Sandra L. Calvert, *Future Faces of Selling to Children*, at 351-54, in *The Faces of Televisual Media: Teaching Violence, Selling to Children* (Edward L. Palmer and Brian M. Young eds., 2d ed. 2003).

¹⁵³ See, e.g., Report of the APA Task Force on Advertising and Children, Section: Psychological Issues in the Increasing Commercialization of Childhood at 5-9 (Feb. 20, 2004) (summarizing research); Barrie Gunter, Caroline Oates, and Mark Blades, *Advertising to Children on TV: Content, Impact and Regulation*, Ch. 3 (2005).

First, they must be able to discriminate at a perceptual level commercial from noncommercial content, and second, they must be able to attribute persuasive intent to advertising and to adjust their interpretation of commercial messages consistent with that knowledge. Each of these capabilities develops over time, largely as a function of cognitive growth and development rather than the accumulation of any particular amount of experience with media content.¹⁵⁴

Children below the age of four or five have difficulty distinguishing between television programs and commercials.¹⁵⁵ Until they are seven or eight, even if they can distinguish commercials from other content, children are generally unable to recognize the persuasive intent of television advertising because of their limited cognitive development.¹⁵⁶ Until children develop this capability, they are thought to be “uniquely vulnerable to commercial persuasion” because they cannot effectively evaluate commercial claims.¹⁵⁷ Even then, children’s “general understanding and skeptical attitude may not be sufficient. Children between the ages of 8 and 12 tend not to invoke their knowledge of persuasive influence attempts when viewing a television commercial, unless explicitly reminded to do so.”¹⁵⁸

(a) Research on Product Placements

Because children under the age of eight generally do not understand the persuasive intent of traditional advertising, it is virtually inconceivable that, even if they recognize product placements as a type of advertising, they would understand that product placements are advertisements intended to promote a product or brand. Indeed, in her 1995 dissertation,

¹⁵⁴ Dale Kunkel, *Children and Television Advertising*, at 378, in *Handbook of Children and the Media* (Dorothy G. Singer and Jerome L. Singer eds. 2001).

¹⁵⁵ *Id.* at 378-79 (summarizing research)

¹⁵⁶ *Id.* at 380-81.

¹⁵⁷ Report of the APA Task Force on Advertising and Children, Recommendation at 1. Indeed, the American Psychological Association has recommended “that television advertising be restricted during programming directed to or seen by audiences primarily composed of children 8 years of age and under.” *Id.*

¹⁵⁸ Elizabeth S. Moore, *Children and the Changing World of Advertising*, 52 J. of Business Ethics 161, 163 (2004). Moore cites research suggesting “that older children (11-12 years olds) may actually be more attentive to entertainment provided by advertising than younger (7-8 years olds), and are more likely to allow it to shape their interpretations of product usage.” *Id.* at 164.

Vollmers found that “the majority of second and fourth grade subjects do not recognize the promotional intent of placements while a large majority of sixth grade subjects do.”¹⁵⁹

As to whether the product placements affect children’s attitudes toward products, her findings were less conclusive. Vollmers found that children recognized and recalled product categories placed in motion pictures and that children viewing the film with product placements were more likely to recall the product categories, but not necessarily the product brands.¹⁶⁰

Contrary to her expectations, she found that the brand placement had no effect on preferences for the brand.¹⁶¹ However, she noted several limitations with the study. First, all of the placements were for established brands. She suggests that a new brand or product featured in a movie may have a greater impact.¹⁶² Second, the placements were not necessarily targeted to young audiences. She points out that the fact that “no change in affect as a result of brand and product placements was found in this study does not mean the phenomena does not occur.”¹⁶³ Vollmers suggested that “[t]argeting placements of new products to a young market may be more effective

¹⁵⁹ Stacy M. Vollmers, dissertation, *The Impact on Children of Brand and Product Placements in Films* at 90 (1995). Vollmers reports on an experiment she conducted in which children in grades 2, 4 and 6 viewed edited versions of the movie “Lassie.” One version of the film had product placements for eight products, while the second version had most of the product placements removed or obscured so that the brand name or logo was not visible. *Id.* at 38-39. The brands/products featured were Pepsi/soda, Quaker Oats /Cereal, American/Gas, Casio/Walkman, John Deere/Tractor, UHaul/moving trailer, Poptarts/Toaster Treats and Pennzoil/Oil. The placements were also of different type and frequency, e.g. obscured placements, single placements, multiple placements, and multiple placements with character use and mention. *Id.* at 81. The children completed questionnaires both before and after viewing the film that asked questions about brand and product recognition, brand and product affect (i.e. whether they liked a product), brand choice, and affect toward the movie and the characters in the movie. *Id.* at 45-46.

¹⁶⁰ *Id.* at 76.

¹⁶¹ *Id.* at 77.

¹⁶² *Id.* at 79. She notes, for example, that Reese’s Pieces peanut butter candy was a relatively new brand when it appeared in E.T. *Id.* at 87.

¹⁶³ *Id.* at 88.

because it may shape initial perceptions associated with the brand.”¹⁶⁴ Finally, she noted that while the study found no immediate influence on brand preference, the impact of product placements on brand preferences might be more long term.¹⁶⁵ Vollmers explains:

Only differences in measures of memory are found with a placement. However, altering memory may impact future interactions with the brand. Memory is important to marketers because consumers often make product decisions without any external information search. Consumers simply search internally for information and choose among recalled brands. If the placement of brands and products in a motion picture creates more top-of-the-mind awareness or moves the brand into the child’s evoked set, marketers have succeeded in their promotional effort.¹⁶⁶

In a recent published work, Auty and Lewis found that product placements do affect children’s choices of brands.¹⁶⁷ They conducted an experiment in the United Kingdom in which 105 children in two age groups (6-7, 11-12) viewed clips of the movie “Home Alone.” One clip contained a product placement for Pepsi and the other did not. After viewing the clips, the children were offered a choice of Pepsi or Coke. The control group that had not seen the product placement preferred Coke over Pepsi (58:42), while the group that had viewed the product placement preferred Pepsi (38:62).¹⁶⁸ This difference was striking because Coke has a significantly greater market share than Pepsi in the UK (75:25).¹⁶⁹ The authors conclude that “this study appears to show a clear effect of product placement upon children’s incidental choice of a drink.”¹⁷⁰ Further, they found “no difference in choice . . . between those who correctly recalled the brand and those who did not, regardless of age, suggesting that explicit memory does

¹⁶⁴ *Id.* at 79.

¹⁶⁵ *Id.* at 89.

¹⁶⁶ *Id.* at 91 (citations omitted).

¹⁶⁷ Susan Auty and Charlie Lewis, *Exploring Children’s Choice: The Remainder Effect of Product Placement*, 21 *Psychology & Marketing* 699 (2004) (*Remainder Effect*).

¹⁶⁸ *Id.* at 708.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 710.

not play a significant role in choice.”¹⁷¹ Thus, this experiment supports research by others showing that failure to remember the exposure does not mean that it has no effect.¹⁷²

Auty and Lewis also found that the hypothesis that “mere exposure may make the individual’s attitude toward the objects more positive is supported by the findings only to the extent that a reminder of the object is provided.”¹⁷³ Thus, they suggest that “implicit memory reactivated by a current exposure provides an explanation for the findings.”¹⁷⁴ They observe that:

Given the tendency of young children to watch videos of their favorite films over and over again, the findings have ethical implications for the use of product placement in films targeted at young children who have not yet acquired strategic processing skills. Without being aware of their exposure to commercial messages, they have been affected by the exposure in some preconscious way.¹⁷⁵

In another article, Auty and Lewis further explore the implications of their experiment.¹⁷⁶ They note that “the surprising dissociation between the children’s ability to recall having seen Pepsi and their choice of this brand over its more successful competitor in the market is, of course, the very effect—increased interest, sales—that advertisers strive for.”¹⁷⁷ They suggest that this result may be explained by the use of psychological models which have been developed

¹⁷¹ *Id.* at 711. They found no statistically significant difference in the ability of each age group to recall the Pepsi placement after prompting, but that younger children required more prompts than the older children, “in keeping with an expected increase in cognitive ability.” *Id.* at 708.

¹⁷² *Id.* at 712.

¹⁷³ *Id.* at 711.

¹⁷⁴ *Id.* at 712. “Explicit memories are both conscious, in the sense that the person is aware of remembering prior events, and intentional, in the sense that the person in in some sense wants, or voluntarily intends, to retrieve them. In contrast, implicit memories are unconscious, in the sense that the person is unaware of retrieving or otherwise being influenced by prior events, and their retrieval is through to occur involuntarily or without intent.” Law & Braun-LaTour at 67.

¹⁷⁵ *Remainder Effect* at 712.

¹⁷⁶ *The “Delicious Paradox”: Preconscious Processing of Product Placements by Children*, in *The Psychology of Entertainment Media: Blurring the Lines between Entertainment and Persuasion* 117 (L.J. Shrum, ed. 2004).

¹⁷⁷ *Id.* at 119.

over the last fifteen years that distinguish between explicit and implicit (nonconscious) memory.¹⁷⁸

Research shows that “implicit memory does not appear to be affected by increasing maturity,” but explicit memory “improves substantially from early childhood to adolescence.”¹⁷⁹ Because memory performance is a function of one’s knowledge base and children have a smaller knowledge base than adults, Auty and Lewis theorize that more product perceptions will be a preconscious level and lead to implicit rather than explicit memories. These implicit memories may influence their feelings toward the product by, for example, creating familiarity that will affect future brand choice.¹⁸⁰ They note that while

[a]dults may be able to guard against preconscious perceptions simply by noting the appearance of a product as a placement with a commercial origin, ...[researchers] found that children 8-12 years of age need cues to produce counterarguments and suggest that that cues would not be effective for children younger than 8 years. Hence one could argue that product placement is likely to be the most effective in young children precisely because it is almost always preconscious, allowing affect without (conscious) cognition: a delicious paradox with potentially insidious and powerful effects.¹⁸¹

They note that product placement “is not strictly subliminal communication . . . because products usually have exposure times measured in seconds rather than milliseconds, often with some verbal labeling.” Nonetheless, product placement may be considered subliminal in that it influences choice on an unconscious basis.¹⁸²

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 124-25.

¹⁸⁰ *Id.* at 126.

¹⁸¹ *Id.* at 128.

¹⁸² *Id.* at 117-18. Some recent research on the impact of product placements on adults also suggests that the measures typically used to assess effectiveness of traditional advertising do not account for the effects of product placements. Law and Braun-LaTour argue that the recall and recognition measures are not capable of detecting more subtle effects of product placements. Law & Braun-LaTour at 64. They conducted an experiment in which adults viewed six excerpts from “Seinfeld” containing at least six product placements (some central to the plot while others simply seen or mentioned) under the guise of collecting their evaluations of the show. After

The FCC has held that “that use of subliminal perception is inconsistent with the obligations of a [broadcast] licensee, and . . . that broadcasts employing such techniques are contrary to the public interest. Whether effective or not, such broadcasts clearly are intended to be deceptive.”¹⁸³ For the same reason, product placements that operate at a subconscious level are deceptive.

(b) The FTC Staff Ruling on Product Placements

It is true that the FTC staff recently found that product placements generally, including those seen by children, were not deceptive.¹⁸⁴ However, this ruling was based on a very limited record. For example, the FTC staff indicates no awareness of the recent research on product placements.

Even given the limited record, the staff analysis glosses over the problem that product placements themselves are deceptive because the audience does not know that the product is being shown or mentioned in order to promote the product and that the program producer has been paid to include it. Instead, the FTC staff seems to be taking the position that a product

viewing the clips, participants completed an “implicit choice task” in which they were asked to choose a brand from a set of two brand names where one brand was present in the episode and the other was not. This task was performed without reference to the viewing. They also completed a similar “explicit choice task” in which they were instructed to think back to the viewing episode and identify the brands present in the video. *Id.* at 72. The study found that “placements that were central to the program were best recalled and recognized though less likely to be chosen. In contrast, ... seen-only placements showed lower recall and recognition compared with heard-only placements but were chosen more frequently.” The researchers who conducted this experiment suggest that it shows that product placements that viewers are not aware of may nonetheless influence them. *Id.* at 73.

¹⁸³ *Public Notice Concerning the Broadcast of Information by means of “Subliminal Perception” Techniques*. 44 F.C.C.2d 1016 (1974). The FCC’s prohibition on subliminally perceptive advertising appears only to apply to television, and not to movie theater commercials or print media. Jeff Richards and Richard Zakia, *Pictures: An Advertiser’s Expressway through FTC Regulation*, 16 Ga. L. Rev. 77, 123-124 (1981).

¹⁸⁴ See *supra* at ____.

placement can only be deceptive if it presents false or misleading information about a product. Under this view, since a product placement generally provides little or no factual information, it by definition, cannot be deceptive.

This position seems inconsistent with the FTC's guidelines on endorsements. FTC guidelines define endorsements broadly to include "any advertising message . . . consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser."¹⁸⁵ It cites as an example of an endorsement a television advertisement for golf balls showing a prominent professional golfer hitting the golf balls even though he says nothing about the golf balls.¹⁸⁶ It is hard to see a distinction between a golfer hitting a golf ball and a judge on "American Idol" sipping a Coke. If anything, the "American Idol" example has a greater potential for deception because the use of the product occurs in a program rather than a commercial. Yet, the FTC requires clear and conspicuous disclosure of any payment in the case of endorsements,¹⁸⁷ but does not require any disclosure in the case of product placements.

Nor is the staff interpretation directly supported by the case it relies upon. In *JS&A Group, Inc.*, the FCC alleged as a completely separate count that it was deceptive for a 30-minute paid program to be held out to the public as an independent program.¹⁸⁸ The same is true in many other cases involving deceptive formats.¹⁸⁹ The deceptive format claim does not seem to depend on whether the information presented about the product is factual.

¹⁸⁵ 16 CFR §255.0(b).

¹⁸⁶ *Id.* Example 5.

¹⁸⁷ *Id.* §255.5. The FTC Guidelines also require that endorsements be true, in the sense that they reflect the "honest opinions, findings, beliefs, or experience of the endorser." §255.1(a).

¹⁸⁸ *JS&A Group, Inc.*, 111 FTC 522 (1989)

¹⁸⁹ For example, in *Vital Basics, Inc.*, 2004 FTC LEXIS 52, para. 20 (Apr. 26, 2004) the FTC alleged that representing, directly or by implication, that these advertisements were independent radio programs and not paid commercial advertising constituted unfair or deceptive acts or practices under the Federal Trade Commission Act. *See also Mega Systems International, Inc.*,

Taken to its logical end, the staff's claim that only advertisements presenting objective information about a product's performance or attributes can be deceptive, would immunize a large number of advertisements from being found deceptive. Much of modern advertising does not communicate information about a product's attributes, price or availability, but rather is concerned with creating a certain image or associating a certain emotion with a product.¹⁹⁰ Moreover, immunizing commercial speech that lacks informational content from regulation would have the effect of turning the commercial speech doctrine on its head. As discussed *supra*, the reason that commercial speech is protected under the First Amendment at all is that it provides useful information to consumers.¹⁹¹ In fact, in *Friedman*, the Court found that the very fact that a trade name conveys no information about the price or nature of the services offered created the potential for misleading the public.¹⁹²

Even assuming, however, that the FTC staff letter correctly interprets its own precedent, Congress of course remains free to make its own determination as to whether certain marketing practices are deceptive.

(c) Research on Character Marketing to Children

Congress could certainly find that using characters popular with children to market unrelated products is deceptive. As the CARU Guidelines state:

Studies have shown that the mere appearance of a character with a product can significantly alter a child's perception of the product. Advertising presentations

1998 FTC LEXIS 207, June 8, 1998 *Synchronal Corporation*, 116 F.T.C. 1189; *Michael S. Levey*, 116 F.T.C. 885, September 23, 1993.

¹⁹⁰ Ronald K.L. Collins and David M. Skover, *Commerce and Communication*, 71 Texas L. Rev. 697, 702-07 (1993)

¹⁹¹ See *supra* at _____. See also Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1 (2000).

¹⁹² 440 U.S. at 12-13.

by program/editorial characters may hamper a young child's ability to distinguish between program/editorial content and advertising.¹⁹³

Or as Center for Science in the Public Interest summarizes the problem: "Younger children may not understand that spokespeople are paid to promote products, and small children may not even understand that cartoon characters do not really exist. Using characters from movies and television show also blurs the line between programs and advertising."¹⁹⁴

A very dramatic demonstration of the effectiveness of character marketing was made at the recent FTC workshop on Marketing, Self-Regulation and Childhood Obesity. Dr. Jennifer Kotler, Director for Knowledge Management, Department of Education and Research at Sesame Workshop, described research they conducted to determine whether the Sesame Street characters influenced food choices.¹⁹⁵ Children were asked whether they wanted to eat broccoli or a Hershey bar. Twenty-two percent chose broccoli. Next, a sticker showing Elmo, a well known character from Sesame Street, was attached to the broccoli and a sticker showing a different Sesame Street character who had not yet been on the air, was attached to the Hershey Bar. This time, 50% of the children said they wanted the broccoli. Then, the stickers were reversed so that the Elmo sticker was on the Hershey Bar. This time, only 11% wanted the broccoli and 89% preferred the Hershey Bar.

Most research on the effect of character marketing on children concerns host-selling on television because, as discussed above, the FCC has a policy against host selling on children's television programs. Atkin, whose study was published in 1975, was the first to investigate host

¹⁹³ CARU Guidelines at 7.

¹⁹⁴ Pesterer Parents at 25.

¹⁹⁵ *The Health Habits for Life Initiative at Sesame Workshop*, available at www.ftc.gov/bcp/workshops/foodmarketingtokids/presentations/jkotler.pdf. See also Transcript, FTC and DHHS Workshop, Perspectives on Marketing, Self-Regulation and Childhood Obesity, July 14, 2005, at 283-289, available at http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript_050714.pdf.

selling.¹⁹⁶ Atkin showed children aged 3 to 7 a commercial for Flintstone's cereal that was embedded within either a "Flintstones" or "Bugs Bunny" cartoon. He found that one fourth of the children who recalled seeing the Flintstones eating cereal thought this activity occurred during the cartoon rather than the commercial. He further found that children who saw the commercial during the "Flintstones" were more likely to desire the cereal than those who saw it during "Bugs Bunny."¹⁹⁷

In the 1980s, Kunkel conducted further research in which children viewed programming ("Flintstones" and "The Smurfs") and commercials (for either Fruity Pebbles Flintstone cereal or Smurfberry Crunch cereal) taped off-the-air on Saturday mornings.¹⁹⁸ He found clear evidence of a "confusion effect related to the host-selling format,"¹⁹⁹ and that both younger (aged 4-5) and older (aged 7-8) children were confused. He also found that the older children were "more favorably influenced toward the advertised product by host-selling than by viewing the same commercial in a non-host-selling format."²⁰⁰ Kunkel suggested that older children are more skeptical towards commercials generally and that their skepticism

may be minimized in the host-selling scenario. By definition, host-selling commercials feature figures who are well-known and trusted program heroes. Reactions to the products endorsed by such figures may be enhanced by an increase in children's positive affect toward the characters generated through their viewing of the adjacent program content.²⁰¹

In a 2001 study, Hoy *et al.* conducted experiments using "Flintstones" and "Bugs Bunny" cartoons and cereal commercials comparable to those used by Atkin. While they found that

¹⁹⁶ Mariea Grubbs Hoy, Clifford E. Young, and John C. Mowen, *Animated Host-Selling Advertisements: Their Impact on Young Children's Recognition, Attitudes, and Behavior*, 5 J. of Public Policy and Marketing 171, 173 (1986).

¹⁹⁷ *Id.*

¹⁹⁸ Dale Kunkel, *Children and Host-Selling Television Commercials*, 15 Comm. Res. 71 (1988).

¹⁹⁹ *Id.* at 81.

²⁰⁰ *Id.* at 84.

²⁰¹ *Id.* at 88.

children had no more difficulty distinguishing the commercial from the program when seen in a host-selling context, they did confirm that children were less likely to recognize the commercial's selling intent in the host-selling context than in the non-host condition.²⁰²

This study also found “unexpectedly” that children viewing the Pebble’s cereal ad in the Bugs Bunny cartoon had a larger positive attitude change toward the cereal than those viewing it within the Flintstones cartoon.²⁰³ They speculate that the introduction of different characters may serve as an attention-getter or that children viewing the Flintstones cartoon may be overexposed and bored with the character.²⁰⁴ While Hoy *et al.*’s findings differ from those of Kunkel and Atkin as to the impact of host-selling as that term is defined by the FCC, for purposes of this article, it is irrelevant whether the Flintstones characters sell cereal better when the ad is embedded in a Flintstone’s cartoon or another cartoon. Both studies agree, as do most other researchers, that associating a product with a popular characters can cause children to desire the product.²⁰⁵

²⁰² Hoy et al. at 177, 180. Within the host-selling context, however, children had greater difficulty distinguishing commercial that were imbedded within the program as opposed to those adjacent to the program. *Id.* at 180.

²⁰³ *Id.* at 180.

²⁰⁴ *Id.* at 180-81.

²⁰⁵ One recent study concludes that “although character action and voice may influence a young child’s attention to an ad, recognition of the character and product, and even a positive attitude toward the product, the relation between the spokes-characters and a child’s preference, intention, and choice of product is uncertain.” Sabrina M. Neeley and David W. Schumann, *Using Animated Spokes-Characters in Advertising to Young Children*, 33 J. of Advertising 7, 8 (2004). However, their experiment, which involved pre-school aged children, used animated characters that were created for the purpose of study and were not recognized by children. The authors note that “it is possible that strong experience with a spokes-character, often derived from massive media exposure and popularity of the characters, motivates the leap from liking to preference, intention, and choice.” *Id.* at 20.

A recent study by Garretson and Niedrich examined how different spokes-character qualities affect brand attitudes across market segments.²⁰⁶ This study is not directly on point since it was limited to “non-celebrity spokes-characters,” that is, those that were created for the sole purpose of promoting a product or brand and the subjects of the experiment were undergraduate students, not children.²⁰⁷ Nonetheless, several of their findings have relevance here. They found that trusted spokes-characters were more effective in engendering positive brand evaluations. They also found that the use of spokes-characters results in more favorable brand attitudes for consumers with less brand experience. Because children generally are more trusting and have less brand experience than adults, they are even more likely than adults to be susceptible to spokes-character marketing. Garretson and Niedrich also note that because consumers are exposed to characters at an early age through the use of characters endorsing children’s products, these same characters may be used years later to “prime personal memories, including those of earlier time and felt trust with the character.”²⁰⁸ Thus, exposure to character marketing as a child may even affect product choices later in life.

In sum, there is an ample evidentiary basis for Congress to find that the use of product placements in media watched or used by children and the use of characters from children’s media to market unrelated products is deceptive and misleading.

²⁰⁶ Judith A. Garretson and Ronald W. Niedrich, *Spokes-Characters: Creating Character Trust and Positive Brand Attitudes*, 33 J. of Advertising 25 (2004).

²⁰⁷ *Id.* at 25.

²⁰⁸ *Id.* at 28. Their experiment confirmed that nostalgia was an important factor in engendering character trust. *Id.* at 32.

**D. The Court Would Likely Uphold Legislation
Prohibiting Deceptive Commercial Speech Aimed at
Children**

If Congress were to pass the proposed legislation based on its conclusion that product placements in media used by children and the use of celebrity spokes-characters to market to children was misleading or deceptive, the Supreme Court would likely uphold the proposed restrictions under the first prong of *Central Hudson*. Not only is the commercial speech at issue misleading and unfair, but restricting it is consistent with the concerns underlying the commercial speech doctrine. Specifically, the restriction does not have any significant affect on the speech available to adults. And while restrictions on advertising to adults are disfavored because they are paternalistic, paternalism is appropriate in regulations designed to protect children. In addition, the proposed legislation limits only certain forms of advertising to children, and these forms of advertising provide little if any information to children.

**1. The Legislation is Limited to Advertising to
Children**

The only Supreme Court case that considered restrictions intended to primarily affect children is *Lorillard Tobacco Co. v. Reilly*.²⁰⁹ There, the Court found unconstitutional Massachusetts' regulations that substantially restricted the flow of information to adults. Specifically, the Court found that the prohibition on outdoor advertising of smokeless tobacco and cigars within a 1,000 foot radius of a school or playground was a poor fit with the stated goal of preventing minors from using tobacco products because "in some geographic areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to *adult* consumers."²¹⁰ While recognizing that state had a

²⁰⁹ 533 U.S. 525 (2001)

²¹⁰ 533 U.S. at 562 (emphasis added).

substantial interest in preventing underage tobacco use, it stated that tobacco companies had an interest in conveying truthful information to adults and adults had an interest in receiving truthful information about tobacco products.²¹¹

In *Bolger*, the government argued, among other things, that a statute prohibiting unsolicited mailing of contraceptive advertising was necessary to protect children. It claimed that that statute aided “parents’ efforts to control the manner in which their children become informed about sensitive and important subjects such as birth control.”²¹² The Court agreed that this interest was substantial, but found that the means did not fit the end. It found it reasonable to assume that parents would exercise control over what enters their mailboxes. Further, any marginal protection for children would be at the expense of suppressing the availability of this information to adults: “The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.”²¹³

Unlike outdoor advertising or the prohibition on mailing certain advertisements, prohibiting product placements and character marketing in media or products intended for children or largely used by children has only minimal, if any, impact on adults’ access to information. Nor are the First Amendment rights of program producers limited. Producers would be free to use brands so long as they were not paid (in money or other valuable consideration) to do so. Thus, for example, the legislation would not prevent a scene from being

²¹¹ *Id.* at 564. The point of sale limitation to ads above five feet failed both prongs three and four. The Court found that the five-foot rule failed to advance the state’s goal of preventing underage tobacco use since many minors are taller than five feet, and thus, was not a good fit. *Id.* at 566-67.

²¹² 463 U.S. at 73.

²¹³ *Id.* at 74. The Court recognized that in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the government’s interest in protecting children justified limits on broadcasts heard by adults. However, it distinguished mail from broadcasting because it is less intrusive and can be better controlled by parents. *Id.* at 75.

shot in Times Square, or preclude the use of brand name products integral to a story or even as a joke.

Moreover, in the case of product placements and character marketing, unlike the mail, it is impossible for parents to protect their children. Unlike programming that is excessively violent or contains sexual material, there are no ratings, filters or blocking devices available for product placements or character marketing. Indeed, as discussed *supra*, advertisers' increased interest in product placements is being driven in large part by the desire to find a way to prevent the public from skipping over commercials.

Throughout the Supreme Court's decisions on commercial speech, the Court objects to the paternalism underlying the restrictions. In *Virginia Pharmacy*, for example, the Court observed that it is hard to see how the law protects consumers by keeping them ignorant and refers to the restriction as a "highly paternalistic approach."²¹⁴ Similarly, in *Peel*, Justice Stevens writes, "[w]e reject the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audiences for children's television."²¹⁵ The cases in which restrictions were upheld typically involved advertising directed at populations viewed as more vulnerable. In *Bates*, for example, the Court found that advertising by professions poses special risks of deception because of the public's lack of sophistication concerning legal services.²¹⁶ Similarly, in *Edenfield v. Fane*, the Court distinguished between in-person solicitation by lawyers and in-person solicitation by CPAs on the ground that a typical CPA client was an

²¹⁴ 425 U.S. at 770.

²¹⁵ 496 U.S. at 105.

²¹⁶ 433 U.S. at 383.

experienced business person who would be less susceptible to manipulation than the “young accident victim” involved in *Orhalik*.²¹⁷

Children clearly lack sophistication and are susceptible to manipulation by advertisers. Moreover, although product placements and character marketing generally do not involve in-person solicitation, this is changing. Montgomery describes how new technologies and data collection techniques can allow interactive product placement and other forms of one-on-one marketing to children.²¹⁸ Calvert predicts that “[i]n the future, host selling will take on a new form. Intelligent, humanlike characters will be developed to create personal relationships with individual children and adolescents, thereby cultivating familiarity, affection, and trust.”²¹⁹

Thus, in considering the constitutionality of restrictions on product placements and character marketing to children, the Court should not be concerned that the legislation is paternalistic. Paternalism is appropriate when children are involved, especially here where parents are not able to effectively protect their children without the assistance of the state. Indeed, in other recent cases involving restrictions on noncommercial speech, the Court has been willing to protect children from speech considered harmful to them so long as it did not infringe significantly on the rights of adults. For example, in *United States v. American Library Ass’n*,²²⁰ the Court rejected a First Amendment challenge to the Children’s Internet Protection Act, which requires public libraries that receive grants from the federal government to install software designed to protect minors from accessing material harmful to them. The Court found that the

²¹⁷ 507 U.S. 761, 775 (1993).

²¹⁸ Kathryn C. Montgomery, *Digital Kids: The New On-Line Children’s Consumer Culture* 635, 639-40, 643 in [Singer].

²¹⁹ Sandra L. Calvert, *Future Faces of Selling to Children*, 355 in [Palmer].

²²⁰ 539 U.S. 194 (2004).

measure had little impact on adults because adults could request that the software be disabled.²²¹

In contrast, here, no restriction is imposed on media intended for adults or primarily viewed by adults.

2. The Proposed Legislation Only Limits Certain Forms of Advertising

On several occasions, the Court has noted that regulation of the *form* of commercial speech is permitted. For example, the *Virginia Pharmacy* Court observed that it may be appropriate to require commercial messages to appear in such a form as is necessary to prevent its being deceptive.²²² Moreover, in other cases, the Court has emphasized its special concern with complete bans.²²³

The proposed legislation would not prohibit all forms of advertising to children, but only certain forms that are particularly deceptive and unfair. In other words, Kelloggs remains free to advertise Pop-tarts to children; it merely may not market them to children through paid product placements and by using SpongeBob or other popular children's characters.

3. Product Placements and Character Marketing Lack Informational Value

The commercial speech cases make clear that the main purpose of affording constitutional protection to commercial speech at all is to ensure that the public has access to information.²²⁴ In contrast, product placements and character marketing generally provide no

²²¹ In contrast, in *Ashcroft v. ACLU*, 542 U.S.656 (2003), the Court upheld a preliminary injunction against enforcement of the Children's Online Protection Act where it found that the law would have a significant chilling effect on the speech available to adults and that less speech restrictive and more effective alternatives existed for protecting minors.

²²² 453 U.S. at 771.

²²³ See, e.g., *44 Liquormart*, 517 U.S. at 502; *Lorillard Tobacco*, 533 U.S. at 562.

²²⁴ See, e.g., *Virginia Pharmacy*, 453 U.S. at 754 (prices of prescription drugs); *Rubin v. Coors Brewing Co.*, 514 U.S. at 484 (alcohol content of beer); *44 Liquormart*, 517 U.S. at 489 (prices of liquor).

real information about the product, its characteristics, availability or price. Thus, the case for protecting these forms of commercial speech is weak.

Moreover, there is no effective way to make product placements or character marketing non-misleading by requiring disclosures. In its FTC Complaint, Commercial Alert asked that the FTC require that product placements be identified when they occur as well as at the beginning of a program and that such disclosure be clear and conspicuous.²²⁵ While this may be an appropriate way to reduce the deceptiveness of product placements for adults, it will not be effective for children. Since as discussed above, children under the age of eight generally do not understand the persuasive intent of advertising, merely disclosing that product placement is advertising will not eliminate the unfairness. Moreover, research show that the FCC's analogous requirement of separation devices between children's programs and commercials have largely been ineffective.²²⁶

V. WOULD THE LEGISLATION HELP TO REDUCE THE PROBLEM OF JUNK FOOD ADVERTISING?

Even if Congress were to pass such legislation and the Court were to uphold it, it is fair to ask whether this legislation would help solve the problem of childhood obesity, which has received so much attention lately and is the subject of this symposium. Indeed, at the FTC Workshop, Dr. Margo Wootan, Director of Nutrition Policy at the Center for Science in the Public Interest, argued that the problem is not so much that advertisements are deceptive, but that

²²⁵ Commercial Alert FTC Complaint at 2.

²²⁶ APA Task Force on Advertising and Children, Psychological Issues in the Increasing Commercialization of Childhood 6.

the products advertised most often are for food of poor nutritional quality.²²⁷ She also pointed out that advertising can be used to promote healthy food.²²⁸

The legislation proposed here would prohibit product placements and character marketing to children regardless of the type of product being marketed. Thus, for example, it would prohibit the product placements for Hot Wheels toys, Corvettes, and Victoria's Secret, as well as for Coca-Cola and Burger King, because the deceptiveness of the product placement does not depend on the product being promoted. Even promoting products that are good for children in a deceptive manner is still deceptive.²²⁹

A key reason for defining the problem with product placements and character marketing as deception rather than contributing to the epidemic in obesity and other diet-related health problems in children is, as argued above, legislation prohibiting deceptive commercial speech to children is likely to survive constitutional challenge. Legislation prohibiting advertising of unhealthy food products to children would not necessarily be found unconstitutional, but the case for constitutionality would be much harder to make.

If the purpose of legislation is to suppress truthful non-misleading speech to improve the health of children, the courts would have to apply the last three prongs of the *Central Hudson* test. Although it should not be difficult to show that the asserted governmental interest is substantial, it is less clear whether the courts would find that the regulation directly advances the

²²⁷ Transcript, FTC and DHHS Workshop, Perspectives on Marketing, Self-Regulation and Childhood Obesity, July 15, 2005, at 78, available at http://www.ftc.gov/bcp/workshops/foodmarketingtokids/transcript_050715.pdf.

²²⁸ *Id.* at 52.

²²⁹ *Cf. Advertising Council Request for Declaratory Ruling or Waiver Concerning Sponsorship Identification Rules*, 17 FCC Rcd 22616 (2002) (holding that public disclosure required where the Office of National Drug Control Policy pays for stations to run anti-drug public service announcements).

governmental interest asserted and whether it is not more extensive than necessary to serve that interest.

In fact, the Chairman of the FTC has emphasized that “[a]ny form of government limitation on truthful commercial speech faces significant constitutional hurdles.”²³⁰ She asserts that establishing that restricting food advertising to children would directly advance their health would be “at best, a difficult undertaking.”²³¹ Moreover, in her view, it would be even more “difficult to show that there are no other options to protect children’s health that would not involve limiting speech.”²³² Commentators have generally noted that the Court’s review of nonmisleading commercial speech has moved closer to strict scrutiny.²³³ Some Justices would like to see truthful commercial afforded the same level of protection as other forms of speech. For example, in his concurrence in *Lorillard*, Justice Thomas argued for applying strict scrutiny. He pointed out “that to uphold that Massachusetts tobacco regulations would accept a line of reasoning that would permit restrictions on advertising for a host of other products,” citing as an example, advertisements by fast food companies targeting children.²³⁴ Thus, it would require a substantial amount of empirical support for legislation prohibiting food advertising to children to be upheld.

Because so many of the product placements and examples of spokes-character marketing involve unhealthy foods, passage of more limited legislative restricting these deceptive forms of

²³⁰ Remarks, Obesity Liability Conference, *supra* note ___, at 9.

²³¹ *Id.* at 10.

²³² *Id.* Others have made similar arguments. *See, e.g.*, Todd J. Zywicki, Debra Holt, and Maureen K. Ohlhausen, *Obesity and Advertising Policy*, 12 Geo. Mason L. Rev. 979, 991-1003 (2005) (questioning whether food advertising substantially contributes to obesity in children).

²³³ *See, e.g.*, David C. Vladeck, *Lessons From a Story Untold: Nike v. Kasky Reconsidered*, 54 Case Western Reserve L. Rev. 1049, 1059 (2004); Comment, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 Harv. L. Rev. 2836, 2855 (2005).

²³⁴ 533 U.S. at 572, 587-88.

advertising could make a significant contribution to the improving children's health. Moreover, the benefits from prohibiting deceptive advertising far outweigh any benefits that might result from using product placements or characters to market healthy foods. In response to public pressure, Nickelodeon's SpongeBob SquarePants, will soon star on spinach, carrot and fruit bags in supermarkets.²³⁵ While this will likely attract children to these products, using the same character to promote both healthy and unhealthy foods to children could be very confusing to children.²³⁶

VI. CAN THE PROPOSED LEGISLATION BE IMPLEMENTED EFFECTIVELY?

Even if the legislation is constitutional and would contribute to solving the problem of childhood obesity, practical objections are likely to be raised. For example, how can one tell whether a program, website, movie, or video game is targeted to or viewed/used by significant numbers of children?

A. Line Drawing Problems

Determinations of whether a particular program, movie, website or video game is intended for children, or even if not intended for children is watched, visited, or played by substantial numbers of children, are routinely made in a variety of contexts. For example, most movies, television shows, and video games are rated for age appropriateness. Ratings provide a good indication as to whether the film, program or game are likely to be viewed by substantial numbers of children. Demographic data regarding viewers of television programs and magazine

²³⁵ Therese Howard, *Food Marketers Hope Veggies Look Fun to Kids*, USA Today, July 15, 2005, at 5B.

²³⁶ Of course, program producers will be free feature health foods in programming so long as they are not paid to do so.

readers is routinely collected and made available to advertisers. Moreover, certain food products are designed specifically to appeal to children.²³⁷

Certain cable networks, such as Nickelodeon, Disney, and Cartoon Network, are targeted to younger viewers. And certain time periods on the major broadcast networks, primarily Saturday mornings, are typically devoted to children's programming. For purposes of its advertising restrictions, the FCC defines children's programs as "programs originally produced and broadcast primarily for an audience of children 12 years old and younger."²³⁸ Neither the FCC nor the entities covered by its regulations appear to have difficulty determining which programs are included within this definition.²³⁹

CARU also seems to be able to determine what constitutes children's advertising without much difficulty. CARU Guidelines "apply to advertising addressed to children under twelve years of age in all media, including print, broadcast and cable television, radio, video, point-of-sale and online advertising and packaging."²⁴⁰ CARU takes the position that it "should scrutinize children's advertising wherever it appears . . . without reference to program content, form or day-part."²⁴¹ It considers any commercial that is children-directed or for a children's product to come within its purview, but allows advertisers to provide demographics to verify that children do not constitute a significant part of the audience.²⁴²

²³⁷ An example would be Pepperidge Farm's co-branded Nickelodeon slime goldfish that when eaten, color one's tongue green.

²³⁸ 47 CFR §73.670 note 2.

²³⁹ *See Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 2111, 2112 (1991)(finding FCC definition of children's programs well-established and supported by the majority of commenting parties).

²⁴⁰ Scope of Guidelines.

²⁴¹ Children's Advertising in Today's Media Market, available at www.caru.org.

²⁴² *Id.* At the FTC Workshop, CARU Director Elizabeth Lascoux explained that CARU had an "internal working rule that – which we've borrowed from other industry codes, that if there is a

Similarly, the FTC has not had significant problems determining whether websites are directed to children in its implementation of the Children's Online Privacy Protection Act (COPPA). This Act restricts the collection and use of personal information on websites or online services directed to children.²⁴³ A "website or online service directed to children" is a commercial website or online service, or portion thereof, "that is targeted to children."²⁴⁴ In determining whether a website is targeted to children, the Commission considers "its subject matter, visual or audio content, age of models, language or other characteristics of the website or online service, as well as whether advertising promoting or appearing on the website or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition; evidence regarding the intended audience; and whether a site uses animated characters and/or child-oriented activities and incentives."²⁴⁵ The FTC recently requested comment on the adequacy of this definition,²⁴⁶ and Nickelodeon and other companies responded that they found the factors used by the FTC were clear and appropriate.²⁴⁷ These examples suggest that the line drawing problems inherent in legislation of this type are surmountable.

35 percent under 12 demographic in programming before 9:00 at night, we will look at it and consider it within our purview." Transcript, July 15, 2005, at 68.

²⁴³ Children's Online Privacy Protection Act of 1998, P.L. 105-277, codified at 15 U.S.C. §6501 et seq.

²⁴⁴ 15 USC §6501(10).

²⁴⁵ 16 CFR §312.2.

²⁴⁶ As required by COPPA, the FTC recently began a review of the effectiveness of the law and its rules. Among other things, it sought comment on whether its definitions were clear and appropriate. *Children's Online Privacy Protection Rule: Request for Comments*, 70 Fed. Reg. 21107 (April 22, 2005).

²⁴⁷ See Comments of Nickelodeon, FTC Children's Online Privacy Protection Rule, FTC File No. P054505 at 9 (filed June 27, 2005), available at <http://www.ftc.gov/os/comments/COPPARulereview/516296-00018.pdf>, Comments of Time Warner Inc., FTC Children's Online Privacy Protection Rule, FTC File No. P054505 at 5 (filed

B. Experience in Other Countries

Further support for the feasibility of the proposed legislation may be found in the fact that many other countries limit advertising to children, prohibit product placements, and/or restrict character marketing to children.

A survey conducted by the World Health Organization (WHO) found that 62 of 73 countries reviewed had some form of regulation (defined broadly to include self-regulation) of television advertising that specifically referred to children.²⁴⁸ Some, such as Sweden, Norway, and Quebec, Canada ban all television advertising targeted at children.²⁴⁹ Many others do not allow children's programs to be interrupted by advertising or have other types of restrictions.²⁵⁰

In addition, the survey found that 23 countries had "some form of statutory regulation on product placement."²⁵¹ It found that

Regulations on product placements typically take one of several forms, including outright bans on product placements and on "surreptitious advertising" (i.e. hidden advertising that might mislead the public); strong discouragement of product placement, "indirect advertising" or "non-regular" advertising; time restrictions; and guidelines on the use of placed products.²⁵²

June 27, 2005), available at <http://www.ftc.gov/os/comments/COPPARulereview/516296-00019.pdf>.

²⁴⁸ Corinna Hawkes, Marketing Food to Children: the Global Regulatory Environment (WHO 2004).

²⁴⁹ *Id.* at 15-16, 19.

²⁵⁰ *Id.* at 19, Table 4 (summarizing timing and content restriction in selected European countries), 23 (Australia prohibits advertising during programs aimed at pre-school age children, restricts the amount of advertising during programming for primary school-age children, and limits the repetition of advertisements). For a summary of the regulations in the eighteen members of the European Union, see Study on the Impact of Advertising and Teleshopping on Minors, available at http://www.europa.eu.int/comm/avpolicy/stat/studpdf/pubsum_en.pdf.²⁵⁰

²⁵¹ Hawkes at 45.

²⁵² *Id.*

Austria, Belgium (Flemish community), Ireland, Norway and the United Kingdom explicitly ban product placements, while the Czech Republic, Denmark, Germany, Italy, Switzerland and others interpret the ban on surreptitious advertising to restrict product placements.²⁵³

Likewise, several countries limit character selling to children. The United Kingdom prohibits children's television personalities from appearing in any advertisements before 9:00 p.m. and prohibits advertisements for merchandise based on children's programs during the two hours before and after broadcast of the relevant program.²⁵⁴ In addition, the British Broadcasting Corporation recently decided to stop licensing the use of its popular children's television characters such as the Teletubbies in connection with fatty or sugary snack foods.²⁵⁵

Several Scandinavian countries also restrict character marketing. Finland prohibits advertisements in which sales pitches are delivered by familiar cartoon characters or children.²⁵⁶ In Denmark, an executive Order implementing the Television Without Frontiers Directive prohibits people, characters and puppets from children's programs from being shown in advertisements for products of particular interest to children.²⁵⁷ Norway also prohibits advertisements that star people or characters from children's programs.²⁵⁸ The fact that product placements and character marketing are restricted in so many countries suggests that legislation in the US would be workable.

²⁵³ *Id.* at 46, Table 10. Hawkes notes that regulations regarding product placements are "especially open to the vagaries of interpretation." *Id.*, Box 16. She cites as an example, Austria, where prohibits product placement in all children's programs and on public broadcasting programs, but not in television series. *Id.*

²⁵⁴ Hawkes at 19.

²⁵⁵ Emma Ross, *BBC to phase out cartoon character licenses for junk food* (Apr. 5, 2004) www.signonsandiego.com/news/health/20040405-0907-cartoonjunkfood.html.

²⁵⁶ Hawkes at 19.

²⁵⁷ European Commission, Study on the Impact of Advertising and Teleshopping on Minors at 12 (Mar. 2001), available at

http://www.europa.eu.int/comm/avpolicy/stat/studpdf/pubsum_en.pdf.

²⁵⁸ *Id.* at 50.

CONCLUSION

At a time when product placements and popular children's character are increasingly being used to market unhealthy food products to children, limiting these techniques with regard to children could make a significant contribution to addressing the serious problem of childhood obesity. Legislation restricting product placements in media watched by substantial number of children and prohibiting the use of popular children's characters from being used to market unrelated product to children is workable and would likely be found constitutional by the Supreme Court. There is ample evidence to show, under the first prong of the *Central Hudson* test, that these forms of advertising when directed at children are deceptive and unfair, while at the same time, the proposed restrictions would have minimal impact on the speech available to adults.